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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS,
Petitioner,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 1988

QUESTIONS PRESENTED

1. Does the determination of the Court of Appeals requiring the district court to adjudicate the priority and quantification of an Indian aboriginal claim to water violate the federal policy embodied in the McCarran Amendment and decisions of this Court entered thereunder when there is a valid and ongoing state water adjudication process which is adequate to determine water rights claims at issue and in which the Indian tribe is presently participating?

2. Does the determination of the Court of Appeals which mandates that a claimed aboriginal right to water be given priority and be administratively quantified by the Bureau of Indian Affairs in a process of de facto water rights adjudication which excludes participation by irrigators with competing claims violate the due process rights of those irrigators to participate in a timely and meaningful manner in an administrative process which directly and intimately affects their livelihood?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Joint Board of Control of the Flathead, Jocko and Mission Irrigation Districts ("Joint Board"), respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment entered in this matter on November 17, 1987.

OPINIONS BELOW

The November 17, 1987 opinion of the Court of Appeals whose judgment is herein sought to be reviewed, is reported at 832 F.2d 1127 (9th Cir. 1987) and is reprinted in the Appendix to this Petition at A-62 through A-70. The prior opinion of the United States District Court for the District of Montana is reported at 646 F. Supp. 410 (D. Mont. 1986) and is reprinted in the Appendix at A-33 through A-61.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1987. On January 29, 1988, Justice O'Connor entered an order extending the time for the filing of this Petition to and including March 16, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution is reproduced in the Appendix attached hereto. The McCarran Amendment, 43 U.S.C. § 666; 5 U.S.C. § 702; the Act of April 23, 1904, 33 Stat. 302; Act of May 29, 1908, 35 Stat. 444; Act of August 9, 1912, 37 Stat. 265; and Act of July 17, 1914, 38 Stat. 510 are reproduced in the Appendix attached hereto.

Montana statutory provisions, sections 85-2-212, 215, 217, 231, 234, 403, 701, 702 and 703, MCA of the Montana Water Use Act, and sections 2-5-212, 3-7-224, 85-7-1601, and 85-7-1612, MCA are reproduced in the Appendix.

STATEMENT OF THE CASE

The Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts (the "Joint Board") represents approximately 1,700 irrigators who are served by the Flathead Irrigation and Power Project ("FIP" or "Project"), a Bureau of Indian Affairs ("BIA") operated irrigation project located on the Flathead Indian Reservation in northwestern Montana.[1] The Project supplies water to irrigate approximately 127,079 acres of land. Approximately 91.5 percent of this land is held in fee by non-Indian owners. The remaining lands are trust lands.

[1] The Flathead Irrigation Project was created in 1904 as part of an Act which authorized the survey and allotment of the Flathead Indian Reservation and the opening up of surplus unallotted lands to entry and settlement by

(footnote continues)

The irrigators who are served by the Project trace their interests in the irrigation waters flowing through the Project from three sources: First, as the successors to Indian allottees, non-Indian irrigators who own allotted lands have a priority date no later than the date of establishment of the reservation in 1855, the date of the Treaty of Hellgate. *United States v. Powers*, 305 U.S. 527 (1939); *Coleville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). Second, federal water rights certificates were provided to non-Indian irrigators who homesteaded and purchased the unalloted lands on the reservation. Act of May 29, 1908, 35 Stat. 444 (App. A-9); Act of August 9, 1912, 37 Stat. 265 (App. A-12), made applicable to the Flathead Reservation by the Act of July 17, 1914, 38 Stat. 510, codified at 43 U.S.C. § 593 (App. A-13). Third, "secretarial water rights" were granted by the Secretary of the Interior to non-Indian irrigators who originally took their water from private canals and ditches which were not part of the Project system. The validity of these "secretarial water rights" was acknowledged by the Secretary in 1921 (although this does not establish the priority date of those rights), and today water connected with these secretarial water rights is delivered either by the Project or by private ditch systems. See Comprehensive Review Report Prepared at the Direction of the Secretary of the Interior, vol. 2, at 2-5, 2-6 (October 1985).[2] (Def. Ex. 3.)[3]

(footnote continued)

non-Indians. Act of April 23, 1904, 33 Stat. 302. (App. A-3 to 8) The Act of 1940 was amended, *inter alia*, by the Act of May 29, 1908, 35 Stat. 444, which further defined the scope of the irrigation project, the allotment of lands on the reservation, and the repayment of charges for construction of the irrigation project. (App. A-9 to 12) The 1908 Act also provided for the issuance of federal water right certificates for persons who homesteaded and purchased the unalloted lands on the Reservation. The Reservation was opened for settlement by non-Indians in 1909. For a general discussion of the history of the project, see opinion of the district court below, 646 F. Supp. at 416-417 (App. A-40 to 42).

[2] The Comprehensive Review Report was commissioned by the Secretary of the Interior in 1985 as a joint project of the Bureau of Indian Affairs and the Bureau of Reclamation.

[3] References to Exhibits will be identified by the exhibit number utilized in the district court proceedings as there was no docket control number assigned. References to the Clerk's Record will be identified by use of "CR". References to the preliminary injunction hearing transcript will be identified by use of "Tr".

In addition to the important water rights which the irrigators hold, they also are entitled to turnover of operation and management of the Flathead Irrigation Project pursuant to the terms of the Act of May 29, 1908 which provided, in part, that:

> When the payments required by this act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior.

App. A-11.[4]

In 1985, 1986, and 1987, the Joint Board[5] has been involved as an adversary to the United States Government (specifically, the BIA) in litigation concerning BIA-promulgated minimum instream flows and minimum reservoir pool levels to be maintained for fisheries in the reservoirs, rivers, and streams which make up the Project. In each of these lawsuits, the Confederated Salish and Kootenai Tribes ("Tribes") have either been the plaintiff or have intervened as a party defendant.[6]

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[4] This provision is acknowledged in each of the repayment contracts entered into between the three irrigation districts which comprise the Joint Board and the United States to reimburse the Government for construction costs incurred on the Project. There is currently pending in federal district court a suit to effect this turnover of the Project to the irrigators. *Joint Board of Control v. United States,* No. 86-217-M-CCL, (D. Mont. filed Nov. 14, 1986).

[5] The Joint Board was created pursuant to § 85-7-1601, MCA (App. 22). Pursuant to § 85-7-1612, MCA, (App. A-22 to 23) the Joint Board has the authority and power, *inter alia,* to institute and maintain any and all actions, including suits in law or in equity, to enforce, maintain, protect or preserve any and all rights, privileges and immunities enjoyed by the irrigation districts comprising the Joint Board and their respective members.

[6] *Confederated Salish and Kootenai Tribes v. Flathead Irrigation and Power Project et al.,* 616 F. Supp. 1292 (D. Mont. 1985); *Joint Board of*

At the heart of the three lawsuits which have been brought during the 1985, 1986, and 1987 irrigation seasons is the BIA's mismanagement of the Project evidenced by (1) the blind acceptance of the Tribes' claim to an "aboriginal" instream flow right to preserve fisheries with a priority date of "time immemorial" and (2) the concomitant subjugation of the irrigators' claim to waters flowing through the Project to meet the needs of irrigation, for which purpose the Project was constructed by the United States.

Prior to the 1986 irrigation season, the BIA and the Tribes, without any consultation with the irrigators, established a tribal right to minimum instream flows and reservoir pool levels ("1986 Interim Agreement") which failed to take into consideration the needs of agriculture in a water-short year, thus threatening the very livelihood of the irrigators who depend on Project water for their existence. (Ex. 1 to Plaintiff's Complaint, CR 1.) On August 4, 1986, the Joint Board, as the representative of the adversely affected irrigators, brought suit in federal district court in Montana, *Joint Board of Control v. United States, et al.*, 646 F. Supp. 410 (D. Mont. 1986), seeking declaratory and injunctive relief against the implementation of unconscionably high instream flows, invoking the jurisdiction of the court pursuant to 28 U.S.C. § 1331, and judicial review of the actions of the BIA pursuant to 5 U.S.C. § 702.[7] In its complaint, the Joint Board relied, *inter alia*, upon

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(footnote continued)

Control of the Flathead, Jocko and Mission Valley Irrigation Districts v. United States, et al., 646 F. Supp. 410 (D. Mont. 1986), *rev'd*, 832 F.2d 1127 (9th Cir. 1987), petition for writ of certiorari pending; *Joint Board of Control of the Flathead, Jocko and Mission Irrigation Districts v. United States, et al.*, ____ F. Supp. ____ (D. Mont. 1987, appeal noticed to U.S. Court of Appeals for the Ninth Circuit, August 12, 1987).

[7] The Joint Board's five-count complaint alleged that: (1) The implementation of the 1986 Interim Agreement without substantive consideration and acknowledgement by the Government of its fiduciary duty to operate, maintain, and administer the irrigation project in accordance with the purposes for which it was created constituted a breach of the Government's fiduciary obligations and was arbitrary, capricious, and an abuse of

(footnote continues)

a memorandum dated July 30, 1986, prepared by the Project's Irrigation Division Manager,[8] which advised the BIA management that the continued flows mandated by the 1986 Interim Agreement for the Jocko River, a major river flowing through the Project, if not abated, would deplete the stored water available for irrigation on approximately August 13, 1986, with "very detrimental" impacts to irrigators in the Jocko Irrigation District.[9] The Government's own management perceived that the high instream flows were a pretense to the protection of fisheries and were "recommended not to minimize damage to fisheries but to develop future presidence [sic] for larger instream flows". July 30 memorandum at p. 1 (Ex. 2 to Plaintiff's Complaint, CR 1). Moreover, the manager predicted that "[s]hortage in irrigation flows at this time of year will result in substained [sic] losses to the local farm economy specifically". July 30 Memorandum at p. 2 (Ex. 2 to Plaintiff's Complaint, CR 1). This conclusion was further supported by the affidavit of a local irrigator, who had reviewed the Govern-

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(footnote continued)

discretion; (2) the implementation of the 1986 Interim Agreement utilized methodologies for establishing minimum instream flows which are scientifically deficient and produced stream flows in excess of what is needed to sustain native fisheries—causing a water shortage crisis with potentially devastating effects for irrigation/water users; (3) the implementation of the 1986 Interim Agreement breached the contractual management responsibilities owed by the Government to the irrigators; (4) the Government's failure to involve the irrigators in the process of establishing interim instream flows violated the BIA's own regulations; and, (5) the Interim Agreement constituted an impermissible taking of the water ownership rights of the irrigators in violation of their Fifth Amendment right to due process. (CR 1)

[8] The July 30, 1986 memorandum was attached as Exhibit 2 to Plaintiff's complaint. (CR 1)

[9] The 1986 Interim Agreement dramatically increased historical flows on the majority of the streams intertwined with the project, and particularly required a minimum instream flow on the Jocko River below the K Diversion of 62 cfs (cubic feet per second). The evidence adduced at the preliminary injunction hearing held on August 25, 1986 through the testimony of the Project's own hydrologist was that historical flow levels on that part of the Jocko River were 10-15 cfs. (Tr. 102-105) (App. A-26 to 29). Further, the BIA had promulgated a minimum instream flow of 10 cfs for the Jocko River at the K Diversion in 1985 as part of the Government's settlement agreement with the Tribes to conclude that lawsuit. (The Joint Board was not a signatory to that settlement.) (Ex. 1 to Plaintiff's Complaint, CR 1)

ment's July 30 memorandum and concluded that the Government's forecast of potential economic damage to the local farm economy was "conservative."[10]

After three days of taking evidence at the preliminary injunction hearing on this matter, the district court enjoined the 1986 Interim Agreement, holding that the BIA had purposefully excluded the irrigators from participating in the establishment of an instream flow regime in derogation of 25 CFR 171.1(c).[11] In so ruling, the district court carefully and specifically noted that it did not intend to adjudicate competing claims to the water and declined to establish any minimum flows. 646 F. Supp. at 415. (App. A-38) Rather, to provide guidance to the parties to help them resolve interim disputes until a final adjudication could occur in the Montana Water Court,[12] the district court determined that the BIA must operate the Project and provide a "just and equal distribution" of "all waters of the Reservation." 646 F. Supp. at 426. (App. A-60)

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[10] See Affidavit of Pat Nagy Swartz submitted in support of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, ¶ 7-8 (August 4, 1986). (CR 4)

[11] 25 C.F.R. 171.1(c) provides as follows:

> The Officer-in-Charge is responsible for performing such work and taking any action which in his judgment is necessary for the proper operation, maintenance and administration of the irrigation project or unit. In making such judgments, the Officer-in-Charge consults with water users and their representatives, and with tribal council representatives, and seeks advice on matters of program priorities and operational policies. The Officer-in-Charge will be guided by the basic requirement that the operation will be so administered as to provide the maximum possible benefits from the project's or unit's constructed facilities. The operations will insure safe, economical, beneficial, and equitable use of the water supply and optimum water conservation.

[12] Montana has established a comprehensive water adjudication process, see §§ 85-2-211 *et seq.*, which the Montana Supreme Court has found to be appropriate for the resolution of all water claims, including federal claims and Indian claims, *State v. Confederated Salish & Kootenai*, 712 P.2d 754 (Mont. 1985), and comports with the United States Supreme Court's requirements as set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) and *Arizona v. San Carlos Tribe of Arizona*, 463 U.S. 545 (1983).

The Tribes and the Government separately filed notices of appeal of the district court's decision, but the Government subsequently withdrew its appeal prior to the date for filing briefs. On November 17, 1987, the Ninth Circuit reversed the decision of the district court and held that since the Tribes asserted a "colorable" claim to Project waters under their aboriginal rights theory, the BIA is obliged to quantify the Tribes' aboriginal claim before applying the "just and equal" standard for the apportionment of whatever water remained. 832 F.2d at 1132. (App. A-69) Further, the Ninth Circuit determined that the Joint Board and the irrigators it represents have no right to participate in the BIA's quantification of the Tribes' claim, although they are "free to contest by legal means" that quantification. *Id.* at 1132. (App. A-69)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS VIOLATES THE FEDERAL POLICY IN FAVOR OF STATE COURT ADJUDICATION OF WATER CLAIMS CONTAINED IN THE McCARRAN AMENDMENT.

There can be little doubt that one of the most critical economic, social and political issues in the Western United States is the allocation and appropriation of water, a scarce and precious natural resource. For this reason, Congress enacted the McCarran Amendment, 43 U.S.C. § 666 (App. A-14), the scope of which has been interpreted by this Court to permit the adjudication of water claims, whether they be claims made by the Federal Government, Indian tribes or private persons, in one comprehensive process before courts of competent jurisdiction.[13]

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[13] The McCarran Amendment provides in pertinent part as follows:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of

(footnote continues)

As this Court has stated, "the clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. . . . Indeed, . . . actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. . . . The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 819 (1976) (citation omitted).

The panel of the court of appeals below eviscerated this clear federal policy of deference to a comprehensive state process of adjudication of disputed water claims when it held that the district court should have engaged in a piecemeal adjudication of competing water rights based upon a colorable claim presented by the Tribes. In so ruling, the appellate court disregarded this Court's clear admonition that, "Although adjudication of [Indian water] rights in federal court . . . might, in the abstract be practical, and even wise, it will neither be practical nor wise as long as it creates the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decision making, and confusion over the disposition of property rights." *Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 569 (1983).

(footnote continued)

> such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, order, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666(a) (App. A-14).

This concern is particularly valid where, as here, piecemeal adjudication of competing water right claims is the inevitable result of the appellate court's mandate. At present, more than a half dozen distinct constituencies have filed for surface water rights on the Flathead Indian Reservation, including, most notably, the BIA (which filed separate claims on behalf of the Project and on behalf of the Tribes), the Joint Board, the Montana State Board of Lands (for stock and irrigation water claims), the Montana State Department of Fish, Wildlife and Parks, the United States Fish and Wildlife Service, the Tribes (which filed separate claims on behalf of the Tribes and individual allottees and/or members of the Tribes), and individual claimants (including landowners, logging companies, other business enterprises, and cities and towns). These claims have been filed as part of the State's comprehensive water adjudication process which is codified as the Montana Water Use Act. §§ 85-2-211, MCA, *et seq.* That process contemplates that every person who asserts a claim to the use of water must file that claim with the Montana Department of Natural Resources and Conservation ("DNRC"), § 85-2-212, MCA (App. A-14 to 15), including "claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666 [the McCarran Amendment]." § 85-2-701, MCA (App. A-21) Further, all these water rights claims shall be consolidated as necessary by the Montana Water Court for the adjudication of claims including Indian and Federal water rights claims. § 85-2-215, MCA (App. A-17).

In addition, Montana's comprehensive water adjudication plan, § 85-2-217, MCA (App. A-17), provides that a general adjudication of Indian and federal reserved water rights claims shall be suspended so long as the Montana Reserved Water Rights Compact Commission, ("Compact Commission"), created pursuant to § 2-15-212, MCA (App. A-14 to 15), pursues negotiations for the conclusion of individual Compacts with the respective several Indian tribes and/or the federal government. §§ 85-2-702 and 703, MCA (App. A-21 to 22).

Finally, under the Montana Water Use Act, the Montana Water Court has broad judicial powers, including the right to issue preliminary decrees for any hydrologically interrelated portion of a basin, subbasin, drainage, subdrainage, stream or single source of supply of water, § 85-2-231(2), MCA (App. A-18)[14], or any other interlocutory decree or temporary decree necessary for the orderly administration of water rights prior to the issuance of a preliminary decree, § 85-2-231(1)(d), MCA (App. A-18). The chief water judge has the same powers as a state district court judge with regard to matters within his jurisdiction. § 3-7-224(3), MCA (App. A-15).

In this case, pursuant to the terms of the Montana Water Use Act, the Tribes and the United States are presently participating in the Compact Commission process. The court of appeals' mandate here will thus effectively terminate those proceedings, which were intended to simplify the complex process of adjudication, by requiring the district court to adjudicate the water right claims of the Tribes which are the subject of the Compact Commission's negotiations. Moreover, this federal court adjudication will be of a single party's claim to the water, thereby frustrating Montana's comprehensive water adjudication process which, as explained above, was implemented to permit the adjudication of competing claims in one proceeding. Instead, the mandate will create duplicative litigation since the other competing claims to the water will continue to be adjudicated in the Montana water courts or negotiated in the Compact Commission process, and still require those interested parties, including the Joint Board and the irrigators it represents, to intervene and participate in the federal court proceedings to preserve their rights.[15]

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[14] If a compact is negotiated resolving Indian and Federal water rights claims, the contents of that compact are to be incorporated into the preliminary decree. Section 85-2-231(3), MCA. (App. A-18).

[15] Indeed, the Ninth Circuit invited such a result when it noted in its opinion that the Joint Board was "free to contest by legal means" any minimum instream flow and reservoir pool level requirements which the BIA and the Tribes agreed upon. 832 F.2d at 1132 (App. A-69).

The practical affect of the mandate of the appellate court is that the district court upon remand must undertake a complete review of the aboriginal claims of the Tribes. Thus, the district court will be required to go through a three-step process in adjudicating the Tribes' claim to an aboriginal water right: (1) determine whether the Tribes' colorable claim rises to the status of a legal right; (2) define the nature and scope of any such right; and (3) quantify that right. As the appellate court noted in its decision, no record had been made below concerning the Tribes' exercise of any aboriginal right which it might have. 832 F.2d at 1131 (App. A-68). Instead, the appellate court's opinion was premised upon a future showing that aboriginal rights were preserved in the 1855 Hellgate Treaty "[t]o the extent that the Tribes here did exercise aboriginal fishing rights." 832 F.2d at 1131 (App. A-68). Thus, no factual record has been established concerning the nature and extent of any exercise of an "aboriginal fishing right", and the lack of such evidence with respect to the waters of the Flathead Irrigation Project could substantially affect the validity of any colorable claim which the Tribes may assert.[16] Moreover, the Act of April 23, 1904, 33 Stat. 302, (App. A-3 to 8) which opened the Flathead Reservation to non-Indian settlement, and the subsequent Acts of Congress which established the Flathead Irrigation Project and created statutory obligations owed to the irrigators (both Indian and non-Indian) who settled on the open Reservation, may have amended the Hellgate Treaty of

[16] The Tribes argued in the court of appeals, and the panel accepted, that the instant case is analogous to the facts in *United States v. Adair*, 732 F.2d 1394 (9th Cir. 1983), *cert. den. sub nom. Oregon v. United States*, 467 U.S. 1252 (1984), and therefore *Adair* should control. But *Adair* involved another Tribe and another treaty; and, despite any superficial similarities between the Tribes here and the Tribe in *Adair*, or any superficial similarities between the two treaties, there has been no studied analysis of the Tribes' claim to waters on the Flathead Irrigation Project, the history of the Project, or of the opening the Flathead Reservation to settlement by non-Indians, as that history relates to the Tribes' colorable claims. Moreover, *Adair* is the only decision which holds that a priority date of "time immemorial" exists for a right to water for the preservation of fisheries.

1855 in such a way that the "colorable" claims of the Tribes to Project waters may ultimately not rise to the level of a right.[17] These issues, peculiar to the Flathead Indian Reservation, have never been addressed directly by any court.[18] And, since the district court below never reached any of these substantive issues implicated by the Ninth Circuit's decision, there would be no waste of judicial resources and no duplicative effort by insisting that the state adjudication process, designed specifically to focus on such issues, address these claims. For the reasons discussed above, the determination of the court of appeals will have the opposite result by creating precisely the confusion and uncertainty which the McCarran Amendment was enacted to forestall. The inevitable result of the appellate court's decision will be to create tension between federal and state forums and throw the adjudication of water rights on the Flathead Indian Reservation into chaos.

It was precisely this situation which both the Joint Board and district court had intended to avoid at the commencement of the judicial review of the BIA's action. The Joint Board's complaint was, as noted above, framed in terms of an abuse of agency discretion in decision making, in that the conscious exclusion of the irrigators from the critical decision making process was procedurally and substantively defective.[19] In its prayer for relief, the Joint Board did not request that the district court impose its own interim instream flow regime. Rather, the Joint Board sought that the Government be enjoined from implementing the defective 1986 Interim Agreement or any other water management plan which does not conform with the

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[17] See *Menominee Tribe v. United States*, 391 U.S. 404 (1968) and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) for the proposition that Congress has the power to extinguish or amend Indian hunting and fishing rights contained in treaties.

[18] The Ninth Circuit's prior holding in *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. den.* 429 U.S. 929 (1982), is inapposite to the extent that the issue there was the Tribes' claim to the lake bottom of the south end of Flathead Lake, and not the Tribes' claim to waters of the Flathead Irrigation Project for protection of a fisheries resource.

[19] See note 7, *infra*.

Government's "fiduciary, statutory and regulatory responsibilities to operate, maintain, and administer the irrigation project in accordance with the purpose for which it was constructed." Plaintiff's Complaint at 13. (CR 1)[20]

The district court likewise was sensitive to this concern and had articulated its desire to avoid even the semblance of an adjudication in the prior proceedings instituted by the Tribes in 1985:

> The Court will not attempt to qualify or quantity the full extent of the Tribes' relative water rights. . . . The Court further holds that under San Carlos, the proper forum for general adjudication of water rights on the Flathead Indian Reservation lies in the state courts of Montana.

Confederated Salish & Kootenai Tribes v. Flathead Irrigation and Power Project, et al., 616 F.Supp. 1292, 1297 (D. Mont. 1985).[21]

Similarly, in the 1986 litigation which has given rise to this appeal, the district court, prior to commencing the preliminary injunction hearing, admonished counsel to the parties:

> I don't think this is a water adjudication process. And I think if it were, the Court, as I have indicated before, would want to abstain to the state courts. I'm treating this as more an agency abuse question than any kind of water adjudication.

Tr. 8 (App. A-25).

The Ninth Circuit, however, rejected the sensitivity to the federal policy contained in the Joint Board's complaint and the

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[20] In *Nevada v. United States*, 463 U.S. 110 (1983), this Court recognized that the Government may owe fiduciary obligations both to an Indian tribe on whose reservation an irrigation project is located and the persons (both Indian and non-Indian) served by that project. 463 U.S. at 127-128.

[21] See also note 7 to the court's opinion:

> Plaintiff [Tribes] requested the Court to determine specific numerical stream flow and reservoir levels, which the Court emphatically declined to do.

616 F.Supp. at 1294.

district court's opinion, and transformed what had been brought as a review of final agency action pursuant to the Administrative Procedure Act into a water rights adjudication. The appellate court did so ostensibly because "[o]nce a court takes jurisdiction to resolve a water rights dispute, it has "a solemn obligation to follow federal law" that governs Indian water rights." 832 F.2d at 1131 (citation omitted) (App. A-68). Federal law, however, dictates that, if the action is in the nature of a water rights adjudication (rather than a review of final agency action), the district court should decline to exercise its jurisdiction and dismiss the case or resolve the interim dispute without adjudicating the tribal claim to a fishing right.[22]

The vice inherent in the decision below is that the Ninth Circuit would prohibit any district court from undertaking a review of final agency action by the Department of the Interior concerning the allocation of waters on a federally administered water project without also adjudicating, in whole or in part, water rights which may be the subject of concurrent state proceedings. In so doing, the Ninth Circuit is clearly exceeding the bounds of *Colorado River* and *San Carlos;* and, unless nullified, the decision of the Ninth Circuit is an open invitation to adjudicate water rights claims in federal court which heretofore were properly part of state adjudication processes.

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616 F.Supp. at 1294.

[22] Contrary to the Ninth Circuit's opinion, *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985), does not suggest that the federal courts must adjudicate water claims. While the court in *Kittitas* approved the district court's continuing jurisdiction over reservoir releases for the protection of farmers and fisheries, the Court recognized that there was no need to determine at that time the scope of the Indians' fishing rights. *Id.* at 1035, n. 5. Thus, the Ninth Circuit's holding in *Kittitas* is clearly distinguishable from the instant case where the Ninth Circuit has taken the position that the district court should have considered the competing claims with potentially different priorities. 832 F.2d at 1131 (App. A-68).

II. THE EXCLUSION OF THE IRRIGATORS FROM THE ADMINISTRATIVE PROCESS OF ADJUDICATING MINIMUM RESERVOIR POOL LEVELS AND INSTREAM FLOWS CONSTITUTES A TAKING OF A VALUABLE PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW.

It is a fundamental principle of water law that a water right is a property right and appurtenant to the land. § 85-2-403, MCA (App. A-20); *Nebraska v. Wyoming,* 325 U.S. 589, 614 (1945); *Osnes Livestock Co. v. Warren,* 103 Mont. 284, 294, 304; 62 P.2d 206 (1936); *Spaeth v. Emmett,* 142 Mont. 231, 236; 383 P.2d 812 (1963). This principle has been reinforced by the courts with regard to irrigation projects constructed by the Government. In *Ickes v. Fox,* 300 U.S. 82 (1936), this Court stated:

> Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy v. Kerr* 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*ibid*), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.

Id. at 95.[23]

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[23] While *Ickes* involved a reclamation project under the direction of the Bureau of Reclamation, and not the BIA as the instant case, the principle remains the same.

This same principle that a water right is a valuable property right has also been affirmed by the Montana Supreme Court in *General Agriculture Corp. v. Moore*, 534 P.2d 859, 863 (1975):

> Property rights in water consist not alone in the amount of the appropriation, but, also, in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations in the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right . . . .

The decision of the appellate court below effectively eliminates the Joint Board from any meaningful participation in the determination of the priority or the quantification of the Tribes' claim to an "aboriginal" water right. After conceding that the Tribes' claim is only "colorable," the appellate court directs that the BIA determine in consultation with the Tribes the quantity of their aboriginal claim. Thus, the court below directs the BIA to treat the Tribes' claim as having a priority date of "time immemorial," although no evidence has been adduced during the course of this or any related litigation that such a right exists, much less that the priority date of the claim of the Tribes to fish on the waters which are today part of the Flathead Irrigation Project is "time immemorial." [24] Instead, the appellate court would shut the Joint Board out of this process, without providing any opportunity to give comment upon, let alone test, the validity of the claim in the first instance. This situation is intolerable and constitutes a taking of the irrigators' valuable property rights without the slightest semblance of due process guaranteed by the Fifth Amendment.

This Court has been careful to heed the admonition of Justice Jackson in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950) that:

> There can be no doubt that at a minimum [the due process clause] require[s] that deprivation of life,

[24] See n. 16 and 18, *supra*, and accompanying text.

> liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Over the years since *Mullane*, this Court has interpreted the due process requirement in accordance with the facts and circumstances of each case, bearing in mind that:

> The fundamental requirement of due process is the opportunity to be heard and it is "an opportunity which must be presented *at a meaningful time and in a meaningful manner*".

Parratt v. Taylor, 401 U.S. 527, 540 (1981), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis supplied.) And, although this Court has not always held that this principle compels a hearing prior to the initial deprivation of property in each case, a predisposition hearing has not been required only where a preseizure hearing order under a state authorized procedure would be impractical and where the Court could make the assumption that at some time a full and meaningful hearing would be available. *Parratt, supra* at 540-41. Thus, this Court has compelled a hearing in cases where predeprivation notice and hearing could be conducted in order to serve as a check against the occurrence of a wrongful deprivation, see *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Boddie v. Connecticut*, 401 U.S. 371 (1971), *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1967); but has not required a predeprivation hearing where to do so would be impractical in view of the facts and circumstances of the individual case, or where quick action was required to protect an overriding public interest. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (summary and seizure and destruction of drugs pursuant to Food, Drug and Cosmetic Act); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (public interest in protecting against economic harm in view of substantial question of competence bank's management); *Bowles v. Willingham*, 321 U.S. 503 (1944) (upholding rent control decisions of wartime Office of Price Administration without according a prior hearing to affected landlords).

While this Court has adopted as a "usual rule" that, "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate," *Parratt, supra* at 539, quoting *Phillips v. Commissioner,* 283 U.S. 589, 596-97 (1931), the Court has taken a different view where it is not merely property which is to be taken, but when the means of earning an individual's livelihood is at stake. Thus, in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), this Court held that it was improper to terminate a school district employee without first conducting a pretermination hearing. In so ruling, the Court noted, "We have frequently recognized the severity of depriving a person of the means of livelihood." *Id.* at 543. Such a denial tips the balance between the competing interests of the individual whose livelihood is affected and the governmental interest in the avoidance of administrative burdens in favor of the individual. *Ibid.*[25] Likewise, in *Bell v. Burson,* 402 U.S. 535 (1971), the Court acknowledged that a driver's license is often intimately involved in a person's ability to earn a livelihood and as such could not be summarily taken away without a hearing. And, in *Goldberg v. Kelly,* 397 U.S. 254 (1970), this Court held that welfare benefits were so critical to the continued existence of the individual whose benefits were threatened that not only is a pretermination hearing required, but also a full evidentiary hearing at which the benefit recipient can appear to present evidence and cross-examine adverse witnesses.

Unfortunately, the Ninth Circuit in its opinion below lost sight of the critical importance of water flowing through the Project to all claimants and especially to the irrigators served by the Project, when it directed that the BIA and the Tribes could establish a priority date of time immemorial and quantify the Tribes' claim without the participation of the irrigators or other affected parties. The Flathead Irrigation Project provides

[25] The need to balance these competing interests in the determination of "the precise dictates of due process" is well recognized by this Court. *Fusari v. Steinberg,* 419 U.S. 379, 389 (1975) and cases cited therein.

irrigation water to approximately 127,000 acres approximately 90 percent of which are non-Indian owned.[26] There are twelve dams on the Project used for storing irrigation water; there are 108 miles of main supply canals and approximately 1,077 miles of distribution canals with 10,000 structures.[27] There can be no doubt that such an extensive system of dams, canals and waterways, together with the rivers and steams which flow through the Project, are an essential component of the economy of the area. There can also be no doubt that dedication of available stored water and instream flows in response to a claim of an aboriginal right to that water dating from "time immemorial" in the unreasonable amounts quantified by the BIA in 1986 would directly and adversely affect the amount of water available for irrigation. That was the clear import of the testimony of the Project's hydrologist at the preliminary injunction hearing when he testified that the proposed flows would have a detrimental impact on the availability of stored water on the Project.[28] And, the unavailability of that water to meet irrigation needs in deference to a claim to an aboriginal right may profoundly affect the economy of that area. Indeed, that was the reason for the issuance of the July 30, 1986 memorandum of the Government's own irrigation project manager who had concluded that "[s]hortage in irrigation flows at this time of year [the middle of the irrigation season] will result in substained [sic] losses to the local farm economy specifically." (Ex. 2 to Plaintiff's Complaint, CR 1). And, the district court below specifically found that the threat to agriculture caused by the unreasonably high flow levels promulgated by the BIA constituted irreparable injury. 646 F. Supp. at 419 (App. A-45 to 46). The spectre of such dire economic consequences was, *sub silentio*, also acknowledged by the appellate court when it concluded that this controversy is not moot. 832 F.2d at 1130 (App. A-65). And, this Court may take judicial notice of the fact that, once again, 1988 is forecast to be a water short year in the Western United States and in Western Montana particularly.

Thus, what is at stake in this litigation is nothing less than the continued ability of the irrigators represented by the Joint Board to make productive use of their land, to earn a livelihood

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[26] See Comprehensive Review Report, Vol. 2 at 2-1.

[27] Comprehensive Review Report, Vol.-1 at 1-31 and 1-32.

[28] Testimony of William Slack, Project Hydrologist. (Tr. at 108-110) (App. A-30 to 32).

which this Court has recognized and values as much more than a mere right to tangible, inanimate property. See, *Cleveland Board of Education v. Loudermill; Bell v. Burson;* and *Goldberg v. Kelly;* discussed supra at 19. By their very nature, the actions of the BIA, in establishing minimum reservoir pool levels and instream flows in consultation with the Tribes and without any opportunity for irrigator input violate the due process rights of the irrigators represented by the Joint Board.

Previously, the Secretary of the Interior has recognized that the water rights of the irrigators represented by the Joint Board are at the core of their ability to sustain themselves economically and thus the irrigators should be afforded a modicum of due process with respect to important decisions affecting the delivery of water. In the Secretary's regulations, and specifically 25 C.F.R. 171(c)[29], there is express recognition that managers of the Project should "consult" with water users and "seek advice" in making judgments on "program priorities and operational policies". Clearly, the establishment of instream flows and minimum reservoir pools constitute "program priorities and operational policies"; therefore, the vestiges of due process found in the regulation, that is, "consult and advice," should be employed. This, of course, was one of the grounds on which the district court issued its preliminary injunction, but which the appellate court swept aside when it held that the regulation applies only to "irrigation" water. 832 F.2d at 1132. (App. A-69). However, 25 C.F.R. 171(c) makes no distinction between water generally as opposed to "irrigation" water and requires consultation with Tribal representatives as well as water users, thus indicating the regulation has application to claimed Tribal water as well as irrigation water.

The violation of basic due process rights inherent in the appellate court's opinion is even more egregious where, as here, the past and present actions of the BIA now ratified by the

[29] See n. 11, *supra.*

appellate court's opinion constitute a de facto water adjudication.[30] Section 85-2-234(5), MCA (App. A-19 to 20) of the Montana Water Use Act specifically requires that a final decree of a water right issued by the Montana Water Court shall state the amount of water, rate and volume included in each existing right and also state the date of priority of the claimed water right. Thus, by directing the BIA to quantify the claim of the Tribes' here with a priority date of "time immemorial", the appellate court below has usurped the function of the Montana Water Court to adjudicate disputed water rights claims. This, the Joint Board submits, violates the principles of the McCarran Amendment discussed above every bit as much as deferring the issues of priority and quantification to a federal court for final disposition.

Neither the deliberate and judicially sanctioned total exclusion of the irrigators from the administrative process of adjudicating competing claims for water, nor the appellate court's concession that the irrigators are "free to contest" the BIA's administrative adjudication of the Tribes' water right by some unspecified "legal means", 832 F.2d at 1132 (App. A-69), is satisfactory from a due process standpoint. First, such a situation does not provide the irrigators an opportunity to be heard at a meaningful time or in a meaningful manner. *Armstrong, supra*, 380 U.S. at 552. The time for the irrigators to be heard is prior to any administrative adjudication of these claims. Once an administrative adjudication has been completed and the BIA promulgates minimum reservoir pools and minimum instream flows, the irrigators represented by the Joint Board will be in precisely the position they found themselves at the commencement of this litigation; namely, challenging a final agency action in the latter part of the hot summer after permanent damage to crops has begun without having had any

[30] In using the term "adjudication" in this context, the Joint Board does not mean to suggest that any adversarial administrative procedure will occur at which the Tribes must in any way prove either their claim to a priority or the quantification of their alleged priority. Obviously, no such process will occur. Rather, the Tribes' claim will be "adjudicated" only in the sense that the BIA will make a final decision as to priority and quantity.

opportunity to participate in the decision making process. Second, for all the reasons stated above with respect to the vitiating effect which the appellate court's opinion has upon the McCarran Amendment, the adjudication of the Tribes' aboriginal claim as part of an *ex parte* administrative process violates federal policy every bit as much as requiring the federal district court to exercise jurisdiction over these disputed water rights. Third, as a matter of due process, the appellate court's invitation to the irrigators that they challenge the BIA's adjudication by some vague, unspecified "legal means" may be inadequate and certainly is an open invitation to even more profound procedural entanglements.

The inadequacy of the post deprivation hearing in the form of a subsequent legal challenge contemplated by the Ninth Circuit is demonstrated in three ways. First, the opinion of the Ninth Circuit intimates that the Tribes' colorable claim to an aboriginal right is to be treated as a *fait accompli;* that is, the mere assertion of an aboriginal claim precludes the BIA from determining the validity of that claim. Thus, a critical issue in the disposition of the water right, see *General Agriculture Corp.*, supra, 534 P.2d at 863, will never be examined by the BIA; no check on the possibility that a wrongful deprivation has occurred at the agency level will have been made prior to the initiation of review proceedings; and, the agency record will be silent on this most important element of the water rights adjudication.

Second, requiring the Joint Board to wait until some type of postdeprivation hearing to seek vindication places the irrigators in an untenable economic posture. If a suit seeking declaratory and injunctive relief against the implementation of an instream flow regime unilaterally promulgated by the BIA after the conclusion of an administrative adjudication is brought early in the summer, it will be met with the argument that there is an insufficient demonstration by the plaintiff of an imminent harm, since aboveaverage rainfall through the summer growing season might otherwise diminish the adverse impacts of a decreased irrigation water supply. This is exactly the argument advanced by the Tribes in the 1987 litigation when the Joint Board commenced its action in June. *Joint*

Board of Control v. United States, ____ F.Supp. ____ (D. Mont. 1987 appeal pending). If, however, the Joint Board were to delay filing of its lawsuit until irreversible crop damage occurred, time will have lapsed during which a favorable resolution or at a minimum some interim relief might have been obtained which could have ameliorated a pending economic catastrophe. The Hobson's choice which confronts the irrigators as a result of the Ninth Circuit decision is unacceptable, unnecessary, and unconstitutional.

Third, any persons aggrieved by the de facto adjudication of the BIA (the Joint Board and other irrigators it represents are not the only potentially aggrieved parties, as demonstrated by the claimants to waters flowing through the Reservation) potentially have a choice of forum. The Ninth Circuit's opinion here creates the possibility of either a challenge to this final agency action brought in federal district court as contemplated in 5 U.S.C. § 702, or a petition for preliminary or interlocutory relief sought from the Montana Water Court pursuant to § 85-2-231, MCA. It is a distinct possibility that diverse parties with interests and claims antithetical to each other and antithetical to the Tribes' claims could initiate litigation in separate forums and receive different and inconsistent results. Neither judicial economy nor the desirability of conducting water rights adjudications in unified proceedings would be served. Rather, the worst fears of this Court will be realized: the due process rights of claimants to significant property rights affecting their livelihood will have been violated and simultaneously "the possibility of duplicative litigation, tension and controversy between federal and state forums, hurried and pressured decision making, and confusion over the disposition of property rights", *San Carlos, supra,* 463 U.S. at 569, will have been exacerbated.

CONCLUSION

For the foregoing reasons, the Joint Board of Control respectfully requests that its Petition for Writ of Certiorari to the United States Court of Appeals from the Ninth Circuit be granted.

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March 1988

APPENDIX

STATUTES AND CONSTITUTIONAL PROVISIONS

Fifth Amendment

Act of April 23, 1904
33 Stat. 302

Act of May 29, 1908
35 Stat. 444

Act of August 9, 1912
37 Stat. 265

Act of July 17, 1914
38 Stat. 510

5 U.S.C. § 702

McCarran Amendment
43 U.S.C. § 666

Section 2-15-212, Mont. Code Ann.
Section 3-7-224, Mont. Code Ann.
Section 85-2-212, Mont. Code Ann.
Section 85-2-215, Mont. Code Ann.
Section 85-2-217, Mont. Code Ann.
Section 85-2-231, Mont. Code Ann.
Section 85-2-234, Mont. Code Ann.
Section 85-2-403, Mont. Code Ann.
Section 85-2-701, Mont. Code Ann.
Section 85-2-702, Mont. Code Ann.
Section 85-2-703, Mont. Code Ann.
Section 85-7-1601, Mont. Code Ann.
Section 85-7-1612, Mont. Code Ann.

PORTIONS OF THE RECORD

Transcript of Proceedings
Vol. 1 of 3, pp. 8, 102-105, 108-110

OPINION OF THE DISTRICT COURT

646 F.Supp. 410 (D. Mont. 1986)

OPINION SOUGHT TO BE REVIEWED

832 F.2d 1127 (9th Cir. 1987)

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

EXCERPTS OF ACT OF APRIL 23, 1904, 33 Stat. 302

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Issac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

Sec. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

Sec. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners

shall be a United States special Indian agent of Indian inspector of the Interior Department.

Sec. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

Sec. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivision of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

Sec. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salary of not more than eight dollars per day while so actually employed, with such assistants as may be necessary, at a salary not to exceed six dollars per day while so actually employed. Mineral lands shall not be appraised as to value.

Sec. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

Sec. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provision of the

homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided,* That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

Sec. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further,* That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same

fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.

Sec. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provision of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided*, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

Sec. 11. That all of said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

Sec. 12. That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for Catholic mission schools, church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, the said lands to be granted in the following amounts, namely, to

the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditions and for similar purposes for any other missionary or religious societies that may make application therefor within one year after the passage of this Act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations, mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

Sec. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

Sec. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the

reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

Sec. 15. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school, and mission purposes, as provided in sections eight and twelve of this Act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this Act.

Sec. 16. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

Approved April 23, 1904.

EXCERPTS OF ACT OF MAY 29, 1908, 35 STAT. 444

Sec. 15. That section nine, chapter fourteen hundred and ninety-five, Statutes of the United States of America, entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands, after allotment," be, and the same is hereby, amended to read as follows:

"Sec. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and prescribed in section twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further,* That the price of said lands shall be the appraised value thereof, as fixed by the said Commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments, to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided,* That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land

covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided,* That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said Commission, receiving credit for payments previously made: *Provided, however,* That the entryman or owner of any land irrigable by any system hereunder constructed under the provision of section fourteen of this Act shall in addition to the payment required by section nine of said Act be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as fixed by the Secretary of the Interior, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

"The entryman of lands to be irrigated by said system shall in addition to compliance with the homestead laws reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay the charges apportioned against such tract. No right to the use of water shall be disposed of for a tract exceeding one hundred and sixty acres to any one person, and the Secretary of the Interior may limit the areas to be entered at not less than forty nor more than one hundred and sixty acres each.

"A failure to make any two payments when due shall render the entry and water-right application subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys paid thereon. The funds arising hereunder shall be paid into the Treasury of the United States and be added to the proceeds derived from the sale of the lands. No right to the use of water for lands in private ownership shall be sold to any landowner unless he be an actual bona fide resident on such land or occupant thereof residing in the neighborhood of such land, and no such right shall permanently attach until all payments therefor are made.

"All applicants for water rights under the systems constructed in pursuance of this Act shall be required to pay such

annual charges for operation and maintenance as shall be fixed by the Secretary of the Interior, and the failure to pay such charges when due shall render the water-right application and the entry subject to cancellation, with the forfeiture of all rights under this Act as well as of any moneys already paid thereon.

"The Secretary of the Interior is hereby authorized to fix the time for the beginning of such payments and to provide such rules and regulations in regard thereto as he may deem proper. Upon the cancellation of any entry or water-right application, as herein provided, such lands or water rights may be disposed of under the terms of this Act and at such price and on such conditions as the Secretary of the Interior may determine, but not less than the cost originally fixed.

"The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.

"When the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for construction thereof, the management and operation of such irrigation works shall pass to the owners of the land irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior.

"The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

That section fourteen of said Act be, and the same is hereby, amended to read as follows:

"Sec. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the Commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the land, shall be expended or paid, as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation: one half of the money remaining after the construction of said irrigation systems to be expended by the Secretary of the Interior as he may deem advisable for the benefit of said Indians in the purchase of live stock, farming implements, or the necessary articles to aid said Indians in farming and stock raising and in the education and civilization of said Indians, and the remaining half of said money to be paid to said Indians and persons holding tribal rights on said reservation, semiannually as the same shall become available, share and share alike: *Provided,* That the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share to pay any charge assessed against land held in trust for him for operation and maintenance of irrigation system."

ACT OF AUGUST 9, 1912, 37 STAT. 265, CODIFIED AS 43 U.S.C. § 541.

Any homestead entryman under the Act of June seventeenth, nineteen hundred and two, known as the reclamation Act, including entrymen on ceded Indian lands, may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation and cultivation, submit proof of such residence, reclamation and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of

the land to which the certificate applies, to the extent required by the reclamation Act for homestead entrymen: Provided, That no such patent or final water-right certificate shall issue until after the payment of all sums due the United States on account of such land or water right at the time of the submission of proof entitling the homestead or desert-land entryman to such patent or the purchaser to such final water-right certificate.

ACT OF JULY 17, 1914, 38 STAT. 510, CODIFIED AT 43 U.S.C. § 593.

The provisions of the Act of June twenty-third, nineteen hundred and ten (Thirty-sixth Statutes at Large, page five hundred and ninety-two) [43 USCS §§ 441, 442], authorizing the assignment under certain conditions of homesteads within reclamation projects, and of the Act of August ninth, nineteen hundred and twelve (Thirty-seventh Statutes at Large, page two hundred and sixty-five) [43 USCS §§ 541-546], authorizing under certain conditions the issuance of patents on reclamation entries, and for other purposes, be, and the same are hereby, extended and made applicable to lands within the Flathead irrigation project, in the former Flathead Indian Reservation, Montana, but such lands shall otherwise be subject to the provisions of the Act of Congress approved April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), as amended by the Act of Congress approved May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-eight): Provided, That the lien reserved to the United States on the land patented, as provided for in section two of said Act of August ninth, nineteen hundred and twelve [43 USCS § 542], shall include all sums due or to become due to the United States on account of the Indian price of such land.

5 USC § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

McCARRAN AMENDMENT, 43 U.S.C. § 666.

(a) Joinder of United States as defendant; costs. Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State. Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

MONTANA STATUTES

2-15-212. Reserved water rights compact commission. (1) There is created a reserved water rights compact commission.

(2) Commissioners are appointed within 30 days of May 11, 1979, as follows:

(a) two members of the house of representatives appointed by the speaker, each from a different political party;

(b) two members of the senate appointed by the president, each from a different political party;

(c) four members designated by the governor; and

(d) one member designated by the attorney general.

(3) Legislative members of the commission are entitled to receive compensation and expenses as provided in 5-2-301 for each day actually spent on commission business. Other members are entitled to salary and expenses as state employees.

(4) The commission is attached to the governor's office for administrative purposes only. The costs of the commission shall be paid from funds appropriated for that purpose from the water right adjudication account established in 85-2-241.

(5) Members appointed to the commission shall serve until the work of the commission is completed or until they resign or are otherwise unable to serve. A vacancy must be filled in the manner of the original appointment.

3-7-224. Jurisdiction of chief water judge. (1) The chief water judge may, at the discretion of the chief justice of the Montana supreme court, also serve as water judge for one of the water divisions.

(2) The chief water judge has jurisdiction over cases certified to the district court under 85-2-309 and all matters relating to the determination of existing water rights within the boundaries of the state of Montana.

(3) With regard to the consideration of a matter within his jurisdiction, the chief water judge has the same powers as a district judge. He may issue such orders, on the motion of an interested party or on his own motion, as may reasonably be required to allow him to fulfill his responsibilities including, but not limited to, requiring the joinder of persons not parties to the administrative hearing being conducted by the department pursuant to 85-2-309 or 85-2-402 as deemed necessary to resolve any factual or legal issue certified pursuant to 85-2-309(2).

85-2-212. Order by supreme court. (1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of a claim of an existing water right in substantially the following form:

"WATER RIGHTS ORDER

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED. (This introductory sentence shall be printed in not less than 12-point boldface type.) This order is notice of commencement of procedures for the general adjudication of existing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency or the state of Montana, and federal agency of the United States of America on its own behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the department no later than June 30, 1983. Claims for stock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources are exempt from this requirement; however, claims for such uses may be voluntarily filed. Claims filed with the department in the Powder River Basin in a declaration filed pursuant to the order of the department of natural resources and conservation or a district court issued pursuant to sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are also exempt.

For further information, contact the department of natural resources and conservation, Helena, Montana, for a copy of the law and an explanation of it."

(2) Upon petition of the attorney general, the Montana supreme court shall issue the order called for in subsection (1) with a shorter claim filing period of not less than 1 year, subject to extension not beyond June 30, 1983, by the Montana supreme court upon petition of the attorney general, in those

basins or subbasins where state adjudication jurisdiction is being or is likely to be challenged.

85-2-215. Consolidation of matters. The water judge may consolidate all matters concerning the determination and interpretation of existing water rights within the water judge's division in any combination or groups of claims or matters for joint hearings or proceedings conducted by the water judge or water master in any location within the division. The water judge may make such consolidations as are necessary to administer the requirements of this part and part 7 in adjudicating claims of existing water rights.

85-2-217. Suspension of adjudication. While negotiations for the conclusion of a compact under part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies which are negotiating are suspended. The obligation to file water rights claims for those reserved rights is also suspended. This suspension shall be effective until July 1, 1993, as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, 1993, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section.

85-2-231. Preliminary decree. (1) The water judge shall issue a preliminary decree. The preliminary decree shall be based on:

(a) the statements of claim before the water judge;

(b) the data submitted by the department;

(c) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an

approved compact, the filings for federal and Indian reserved rights; and

(d) any additional data obtained by the water judge. The preliminary decree shall be issued within 90 days after the close of the special filing period set out in 85-2-702(3) or as soon thereafter as is reasonably feasible. This section does not prevent the water judge from issuing an interlocutory decree or other temporary decree pursuant to 85-2-321 or if such a decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree.

(2) A preliminary decree may be issued for any hydrologically interrelated portion of a water division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, or single source of supply of water, at a time different from the issuance of other preliminary decrees or portions of the same decree.

(3) The preliminary decree shall contain the information and make the determinations, findings, and conclusions required for the final decree under 85-2-234. The water judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of part 7 that has been approved by the legislature and the tribe or federal agency.

(4) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree set forth in subsections (1) and (3), and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied, he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree.

85-2-234. Final decree. (1) The water judge shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree.

(2) The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree without alteration unless an objection is sustained pursuant to 85-2-233; provided that the court may not alter or amend any of the terms of a compact except with the prior written consent of the parties in accordance with applicable law.

(3) The final decree shall establish the existing rights and priorities within the water judge's jurisdiction of persons required by 85-2-221 to file a claim for an existing right, of persons required to file a declaration of existing rights in the Powder River Basin pursuant to an order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, and of any federal agency or Indian tribe possessing water rights arising under federal law, required by 85-2-702 to file claims.

(4) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person, federal agency, and Indian tribe named in the decree are based.

(5) For each person who is found to have an existing right arising under the laws of the state of Montana, the final decree shall state:

(a) the name and post-office address of the owner of the right;

(b) the amount of water included in the right, as follows:

(i) by flow rate for direct flow rights, such as irrigation rights;

(ii) by volume for rights, such as stockpond and reservoir storage rights, and for rights that are not susceptible to measurement by flow rate; or

(iii) by flow rate and volume for rights that a water judge determines require both volume and flow rate to adequately administer the right;

(c) the date of priority of the right;

(d) the purpose for which the water included in the right is used;

(e) the place of use and a description of the land, if any, to which the right is appurtenant;

(f) the source of the water included in the right;

(g) the place and means of diversion;

(h) the inclusive dates during which the water is used each year;

(i) any other information necessary to fully define the nature and extent of the right.

(6) For each person, tribe, or federal agency possessing water rights arising under the laws of the United States, the final decree shall state:

(a) the name and mailing address of the holder of the right;

(b) the source or sources of water included in the right;

(c) the quantity of water included in the right;

(d) the date of priority of the right;

(e) the purpose for which the water included in the right is currently used, if at all;

(f) the place of use and a description of the land, if any, to which the right is appurtenant;

(g) the place and means of diversion, if any; and

(h) any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under 85-2-702.

85-2-403. Transfer of appropriation right. (1) The right to use water shall pass with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in appropriation rights shall be without loss of priority.

(2) Failure to comply with the provisions of 85-2-402 does not render a conveyance or reservation of a water right void, but the right may not be used until the department has approved the change. This subsection applies retroactively, within the meaning of 1-2-109, to a conveyance or reservation made after July 1, 1973.

85-2-701. Legislative intent. (1) Because the water and water rights within each water division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. Therefore, it is the intent of the legislature that the attorney general's petition required in 85-2-211 include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666. However, it is further intended that the state of Montana proceed under the provisions of this part in an effort to conclude compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state.

(2) To the maximum extent possible, the reserved water rights compact commission established under 2-15-212 should make the negotiation of water rights claimed by the federal government or Indian tribes in or affecting the basins identified by 85-2-218 its highest priority.

85-2-702. Negotiation with Indian tribes. (1) The reserved water rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings shall be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written request for the initiation of negotiations under this part and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Upon receipt of such written designation from the governing body of a tribe, compact negotiations shall be considered to have commenced.

(2) When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana and any affected tribal governing body, and approval by the appropriate federal authority.

(3) Upon its ratification by the Montana legislature and the tribe, the terms of a compact must be included in the preliminary decree as provided by 85-2-231, and unless an objection to the compact is sustained under 85-2-233, the terms of the compact must be included in the final decree without alteration. However, if approval of the state legislature and tribe has not been accomplished by July 1, 1993, all Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 6 months. These new filings shall be used in the formulation of the preliminary decree and shall be given treatment similar to that given to all other filings.

85-2-703. Negotiation with federal government. The compact commission may also enter into separate negotiations with the federal government for the conclusion of compacts concerning the equitable division and apportionment of water between the state and its people and the federal government claiming non-Indian reserved waters within the state. The terms and conditions of such negotiations shall be the same as provided in this section for negotiations with Indian tribes.

85-7-1601. Authority for joint operation of districts. Whenever the board of commissioners of one or more irrigation districts, established and organized by virtue of the provisions of 85-7-101 through 85-7-103 shall, in their discretion, deem it advisable for the best interests of their district to operate, manage, supervise, and maintain the operation of their district jointly with another irrigation district, the said commissioners are hereby authorized and empowered to enter into written contracts for the creation of a joint board of control. Where irrigation works lie partly in the state of Montana and partly in an adjacent state, the board of commissioners may contract with the district or districts in the adjacent state for the creation of a joint board of control.

85-7-1612. Board of control—powers and duties. (1) The board of control established by this part is the operating agent of the contracting districts for the operation and maintenance of irrigation and/or drainage works and the delivery of water therefrom.

(2) The board shall make and execute all necessary contracts; employ and appoint such agents, officers, and employees as may be required; and prescribe their duties.

(3) The board may institute and maintain any and all actions and proceedings and suits at law or in equity, necessary or proper in order to fully carry out the provisions of this chapter or to enforce, maintain, protect, or preserve any and all rights, privileges, and immunities created by this part or acquired in pursuance thereof. In all courts, suits, or proceedings, the board may sue, appear, and defend in person or by its attorneys and in the name of such board of control.

(4) The board may adopt rules and bylaws governing the calling and holding of meetings of the board; the manner of transacting business thereat; and the publishing or posting of the orders, resolutions, and proceedings of the board. The board shall pass or adopt bylaws and rules for the apportionment and distribution of water to the lands of the contracting districts and for the protection and preservation of the works and other property of the districts. All orders and resolutions shall be passed or adopted by a majority of the members of the board of control by a "yea" and "nay" vote, to be entered upon the records of the board.

(5) The board of control may perform all other acts necessary or appropriate to fully carry out the purposes of this part.

(6) The board of control may plan, acquire, construct, operate, maintain, lease, and finance an undertaking through the issuance of revenue bonds, as provided in part 14 of this chapter.

In The United States District Court
For the District of Montana
Missoula Division

* * * * * * * * * *

THE JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS,

Plaintiff,

v.

THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF THE INTERIOR; THE HONORABLE DONALD HODEL, SECRETARY OF THE INTERIOR; THE BUREAU OF INDIAN AFFAIRS, AN AGENCY WITHIN THE DEPARTMENT OF THE INTERIOR; STANLEY SPEAKS, DIRECTOR, PORTLAND AREA OFFICE, BUREAU OF INDIAN AFFAIRS; AND THE FLATHEAD IRRIGATION AND POWER PROJECT, AN AGENCY WITHIN THE BUREAU OF INDIAN AFFAIRS,

Defendants,

and

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Intervenor-Defendant.

Cause No. CV-86-156-M-CCL

TRANSCRIPT OF PROCEEDINGS
VOLUME 1 OF 3
BEFORE THE HONORABLE CHARLES C. LOVELL
UNITED STATES DISTRICT COURT JUDGE
HELENA, MONTANA
MONDAY, AUGUST 25, 1986

methodologies were used to select the flow levels for the fish. And we have an agricultural engineer who is scheduled to give brief testimony on the impact, even if all the water were diverted in the Jocko system down the two canals in question, what the impact of that would be.

THE COURT: To give you just a capsule of my view on this point, number one, the Court does have jurisdiction to entertain this action, so I think those of you who dispute jurisdiction, if you don't feel you've already made a record on it sufficient to satisfy yourselves, you can do so. But I do intend to go ahead and entertain the case.

I don't think that the Court has jurisdiction to do some of the things that some of the parties want the Court to do. On the other hand, I'm convinced that there is jurisdiction for the Court to look into the case, as we did last year where rights of the Tribes were concerned, and I think there's jurisdiction now.

I don't think this is a water adjudication process. And I think if it were, the Court, as I've indicated before, would want to abstain to the state courts. I'm treating this as more an agency abuse question than any kind of water adjudication.

For that reason I don't think that we need get into specific water rights of the irrigators or the

A Pretty much from historical facts and going back to the stipulation from the fall before. They were established as a means to give us some place to work from so that our people in the field could know how—how to regulate streams.

Q When you say historical fact, did you look at past records of the Flathead Irrigation Project?

A Past records and past discussions with various water masters and past hydrologists.

Q Let me direct your attention to the flow for the Jocko River. And beside it you have—below each project diversion—do you see that?

A Yes.

Q And you've got 10 cfs there?

A Yes.

Q Which diversions are you talking about there?

A I'm talking about, primarily, the diversion on the—from the Middle Fork of the Jocko and from the mainstream both at S Canal and K Canal—the diversion of the Middle Fork taking water over the divide eventually into the Mission Valley.

Q You were talking, though—about the Jocko River below the K Diversion?

A Yes. That was one of the places, yes.

Q Okay. Does the project have a measuring

device on the Jocko River below the K Diversion?

A It does now.

Q Did it—has it for the past several years?

A No, it hasn't.

Q Okay. How did you arrive at a historical number of 10 cfs below the K Diversion on the Jocko?

A That was a—that figure was arrived at as a result of the stipulation from the—from last year.

Q Uh-huh.

A Since we had—had not had an historical basis to go by and that was the consensus that we were on there last year, we cut a notch in the diversion structure and we would allow that much through. And that's the way we did it.

Q Based on your personal knowledge of the project, do you know whether 10 cfs has historically went down the Jocko River below the K Diversion?

A I don't think that. No.

Q Does the project allow water to go through the diversion works at the K and allow water to go down the Jocko River?

A Yes.

Q Okay. And hasn't it historically allowed water to go down the Jocko River below the K Diversion?

A In most years, yes, to my knowledge. Yes.

Q And are you telling me that you don't know that the—or that you don't have an idea that the amount of flow below the K Diversion has historically been around 10 to 15 cfs?

A Since we don't have a measuring device there, we haven't got day-to-day records. I don't positively know that. I have a feeling that that's undergone—that it's been about—

Q You have a feeling?

A Yes. It's an understanding.

Q Okay. What I want to you to do is tell the Court what that understanding—how you arrived at that understanding that historically 10 to 15 cfs had been put in the Jocko River below the K Diversion.

A Well, in talking with the—like I say, with the hydrologist that was working there—he trained me as I came on board—talking with other water masters and ditch riders in the area.

Q And—

A And this would be an estimate on the basis—on their part.

Q Isn't it true that the K Diversion leaks approximately 10 to 15 cfs down the Jocko River below the K Diversion?

A Yes. In this particular season it's leaked in

excess of that.

Q Okay. And the project has known that it's leaked that water down the Jocko River?

A Yes. This is correct.

Q And they've allowed it to—allowed that water to go down the Jocko River below the K?

A Yes.

Q Now, were you at any meeting with the Portland area office personnel where your proposed flows were discussed? And I'm talking about the flows which are attached to Exhibit 3.

A Yes.

Q And were those flows rejected?

A I don't know that they were rejected, but it was explained that we wouldn't use them.

Q And why wouldn't you use those flows?

A I don't know what their reasons were. I understood they were to do some more studies, and they didn't want to use this as a basis for it.

Q Was the—were the tribal—were any representatives of the Tribes present at that meeting?

A No, I don't think so.

Q Okay. Did you attend a meeting on March 12 with the Tribes where these flows were discussed?

A I couldn't be certain of that.

increased flows identified in Exhibit 9?

A Yes.

Q And what kind of concerns did you express to Mr. Burnham?

A That they would impact these higher inflection points—these higher flows that's indicated here—would have a definite impact on the way we delivered water and the supplies that were available.

Q For the Jocko did you specifically talk about the 62 cfs with Mr. Burnham?

A Yes.

Q And did you tell him that it would have a serious impact on the availability of stored water in the Jocko District?

A Yes.

Q Is that correct?

A Yes. That's correct.

Q Did you also talk to him about the Mission and Post Creek flows?

A Yes.

Q Did you tell him that the increased flows on the Mission and Post Creek streams would also have a detrimental impact on the availability of stored water from the Mission District?

A I indicated that they would—they could this

year and they would over a long period of time—other years considering.

Q Okay.

A This year the Mission Valley wasn't in such a serious condition as the Jocko was.

Q Uh-huh. Why do you say that it would have a detrimental impact on future years?

A Because those are quite high flows and they would detract from the amount we would be able to store and be able to deliver. They would, obviously, have to go down the creek and be lost to irrigation.

Q Does the—in the Mission District does the project carry over from year to year stored water?

A Some years, yes.

Q Okay. And if the water—if the increased flows were allowed to have continued, would that have impacted the ability of the project to carry over water for future years?

A Yes.

Q Do you know what specific reservoirs would be impacted by those increased flows?

A There are six main reservoirs in the Mission Valley—table reservoirs: St. Mary's Lake, and Mission Reservoir, McDonald Lake Reservoir, Nine Pipe, and Kicking Horse and Pablo Reservoir.

Q And did you mention that to Mr. Burnham—that those reservoirs could be impacted by these increased flows?

A I don't know that I enumerated them in that way, but, yes, it was implied. And he understood both of us.

Q What did Mr. Burnham say? Did he—what was his response to your concerns?

A Mr. Burnham was gathering information so that he could present it to Mr. Speaks to make an enlightened decision.

Q And who was Mr. Speaks?

A The area director.

Q For the BIA?

A For the BIA.

Q And he's the person that ultimately makes the decision?

A Yes.

Q Did Mr. Burnham say that he would relate your concerns to Mr. Speaks?

A Yes, he did.

Q Did anybody else express any concerns to Mr. Burnham prior to the implementation of these flows in your presence?

A Yes. General consensus of those that were

The JOINT BOARD OF CONTROL OF the FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICT, Plaintiff,

v.

The UNITED STATES OF AMERICA; The United States Department of the Interior; The Honorable Donald Hodel, Secretary of the Interior; The Bureau of Indian Affairs, an agency within the Department of Interior; Stanley Speaks, Director, Portland Area Office, Bureau of Indian Affairs; and the Flathead Irrigation and Power Project, an agency within the Bureau of Indian Affairs; Defendants,

and

The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Intervenor-Defendant.

No. CV-86-156-M-CCL.

United States District Court,
D. Montana,
Missoula Division.

Oct. 16, 1986.

OPINION AND ORDER

LOVELL, District Judge.

INTRODUCTION

For the second consecutive year these same parties are before the Court quarreling over water allocation on the Flathead Indian Reservation.

In July 1985, the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation ("Tribes") commenced an action to enjoin the dewatering of streams and reservoirs on the

Reservation for irrigation. The Tribes claimed that distribution of water by the Flathead Irrigation Project ("FIP" or the "Project") was threatening the existence and preservation of tribal fisheries, in violation of the Hell Gate Treaty of 1855, 12 Stat. 975. The United States was named as a defendant and appeared to defend the Project, which is administered by the Bureau of Indian Affairs, Department of the Interior (BIA). Upon motion, the Court permitted intervention of the Joint Board of Control of the Flathead, Mission and Jocko Valley Irrigation Districts ("JBC"), which represents the 2,600 water users served by FIP, and of the State of Montana, which claimed an interest arising from its statewide water adjudication process.

Following issuance of a temporary restraining order, the Court set hearing on the Tribes' motion for preliminary injunction. At the time of hearing, the Court was presented with a stipulation between the Tribes and the United States, setting forth certain procedures by which instream flows were to be established and providing designated minimum instream flows for particular streams and minimum levels for particular reservoirs. The agreement by its terms was to expire October 31, 1985.

Upon acceptance of the stipulation by all parties, the Court dismissed the action without prejudice as moot. *See Confederated Salish and Kootenai Tribes v. Flathead Irrigation and Power Project, et al,* 616 F.Supp. 1292 (D.Mont.1985).

On August 4, 1986, the JBC filed the present action for injunctive relief, claiming that in its efforts to develop a water management plan for the 1986 irrigation season, the BIA abused its discretion by wholly failing to consider the rights and interests of JBC members. Again, the United States and its pertinent agencies and officials were the only defendants named. The Court granted a motion to intervene by the Tribes and, after an ex parte hearing at which both sides appeared, on August 6, 1986, issued a Temporary Restraining Order enjoining the Project from continuing implementation of the 1986 interim flows established by the BIA.

JURISDICTION

The Court's jurisdiction to entertain this action is based upon 28 U.S.C. § 1331 and 5 U.S.C. § 702. The existence of jurisdiction is disputed by all defendants.[1] The United States asserts that neither the federal question statute nor the Administrative Procedure Act constitutes a waiver of its sovereign immunity, but that there must be an independent basis for federal jurisdiction and an independent ground showing consent to be sued.

The Government further claims that jurisdiction cannot be grounded on any nebulous fiduciary or trust duty owned by the BIA to the irrigators, because no such fiduciary relationship exists. The United States asserts that there is no other independent statutory or contractual basis for federal jurisdiction, and that the action must therefore be dismissed.

Finally, the government asserts that regardless of the Court's caution to avoid water rights adjudication, any order affecting the distribution of water will necessarily impact upon prioritization and quantification of water rights and thus that the Court should refrain from exercise of jurisdiction in the interests of wise judicial administration.

[1] These arguments are without merit. The United States correctly asserts that the Administrative Procedure Act does not provide an independent basis of jurisdiction to review agency actions. *Califano v. Sanders,* 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977). The Ninth Circuit Court of Appeals has held that section 702 of the APA does, however, waive sovereign immunity in non-statutory review actions for non-monetary relief brought under 28 U.S.C. § 1331. *See Assiniboine and Sioux Tribes v. Board of Oil and Gas,* 792 F.2d 782, 793 (9th Cir.1986), and cases cited therein.

[1] The Tribes make no argument on this point, but merely adopt the contentions advanced by the United States; therefore, the Court will refer only to the United States when discussing the jurisdictional claims raised. In the 1985 proceeding the JBC vigorously disputed jurisdiction as did the United States.

[2, 3] Moreover, the APA permits judicial review of agency actions where the claim for relief is keyed to another federal statute and there is no specific provision in the statutory scheme that precludes review. *See Presidio Bridge Co. v. Secretary of State,* 486 F. Supp. 288, 293 n. 1 (W.D.Tex.1978). A right to judicial review is presumed unless a statute precludes review or the action is one committed to agency discretion. *Assiniboine and Sioux Tribes v. Bd. of Oil and Gas, supra,* 792 F.2d at 791; 5 U.S.C. § 701. The administration of Indian Irrigation Projects is governed by 25 U.S.C. § 381, *et seq.,* and the regulations promulgated thereunder. There is no indication that Congress intended judicial review to be precluded under this scheme.

[4] The "committed to agency discretion" exception to the presumption of reviewability has been narrowly construed, and applies only "in those very limited circumstances in which Congress has drafted a statute so that the courts have 'no meaningful standard' against which to judge the agency's exercise of discretion.," *Assiniboine and Sioux Tribes v. Bd. of Oil and Gas, supra,* 792 F.2d at 791. The regulations under 25 U.S.C. § 381 provide sufficient standards by which to judge the BIA's actions herein; thus, the Court finds that neither exception to the presumption of reviewability applies to this case, and that jurisdiction is proper under 5 U.S.C. § 702 and the rule stated in *Assiniboine and Sioux. See also, Northern Cheyenne Tribe v. Hodel,* CV 82-116-BLG (D. Mont. Memorandum Opinion dated 5/28/85) slip op. at 8 (motion for reconsideration pending).

[5, 6] The United States also suggests that jurisdiction is improper because the plaintiff has failed to exhaust its administrative remedies. Unless application of the doctrine of exhaustion is statutorily mandated, its application rests within the discretion of the district court. *Assiniboine and Sioux Tribes, supra,* 792 F.2d at 790; *Southeast Alaska Conservation Council v. Watson,* 697 F.2d 1305, 1309 (9th Cir. 1983). More importantly,

> [e]xhaustion of administrative remedies is not required where administrative remedies are inadequate or not efficacious, where pursuit of administrative

> remedies would be a futile gesture, where irreparable injury will result unless immediate judicial review is permitted, or where the administrative proceeding would be void.

Watson, supra, 697 F.2d at 1309, *citing Aleknagik Natives, Ltd. v. Andrus*, 648 F.2d 496, 499 (9th Cir.1980). As in *Watson*, exhaustion will not be required in this case, where an immediate decision is required on the appropriateness of a preliminary injunction.

[7] Finally, the Court rejects the Government's contention that exercise of jurisdiction should be deferred under *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). *San Carlos*, following the decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), held that a federal district court should consider several factors, including whether the state has a comprehensive water rights adjudication and management system, and determine whether dismissal of the federal suit in favor of state proceedings is justified by wise judicial administration and efficiency. There is no rule that even a pending state action adjudicating water rights automatically deprives the district court of jurisdiction over issues implicating water. *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1034-35 (9th Cir.1985).

Following this Court's opinion in *Confederated Salish and Kootenai v. Flathead Irrigation & Power Project, supra*, the Supreme Court of Montana handed down its ruling that the disclaimer language contained in Article I of the Montana Constitution of 1972 does not bar state jurisdiction to adjudicate Indian reserved water rights, and that the Montana Water Use Act, Title 85, ch. 2, Mont. Code Ann., is adequate on its face to adjudicate Indian and federal reserved water rights. *State of Montana v. Confederated Salish and Kootenai Tribes, et al.*, Mont., 712 P.2d 754 (1985). The United States intimates that because the state supreme court has now held that Montana's water adjudication process will be applied to Indian and federal reserved water rights, this Court should defer exercise of jurisdiction to the state courts.

Under the principles of *Kittitas Recl. Dist., supra,* and *United States v. Adair,* 723 F.2d 1394 (9th Cir.1983), this Court will exercise its jurisdiction to resolve particular disputes arising under federal law. The Court has stated to these parties, both a year ago and throughout the present litigation, that it has no intention of adjudicating water rights. *See* 616 F.Supp. at 1298. The Court is anxious for the state water adjudication process to reach the Flathead Indian Reservation, but there are indications that this may not occur until as late as 1990.[2] Clearly, there is no state forum available at this time for the parties to air their differences over the water management problems existing on the Reservation. *San Carlos* does not prohibit this Court from hearing and deciding such emergencies prior to the actual adjudication of rights by the state courts.

STANDARD OF REVIEW

1. ***Review of Agency Action.***

[**8, 9**] The Court may set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency decisions may be reversed only if no reasonable basis for the decision has been given by the agency. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285-86, 95 S.Ct. 438, 441-42, 42 L.Ed.2d 447 (1974), *reh'g denied,* 420 U.S. 956, 95 S. Ct. 1340, 43 L.Ed.2d 433. The court is not empowered to substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971).

[**10**] The interpretation of a statute or regulation by the agency charged with its administration is granted substantial deference. *Kidd v. Untied States Dept. of Interior, Bureau of Land Management,* 756 F.2d 1410, 1412 (9th Cir.1985). Deference requires affirmance of any interpretation within the

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[2] *Comprehensive Review Report, Flathead Indian Irrigation Project,* p. 1-7, (October 1985) (admitted at the preliminary injunction hearing as Intervening Defendant's Exhibit C, and hereinafter referred to as *Comprehensive Review*).

range of reasonable meanings the words permit, comporting with the statutes's clear purpose. *Alcaraz v. Block*, 746 F.2d 593, 606 (9th Cir.1984).

[11] On the other hand, the courts are the final authorities on issues of statutory construction, and must reject administrative constructions of a statute inconsistent with a statutory mandate or that frustrate the policy Congress sought to implement. *State of Alaska v. Lyng*, 797 F.2d 1479, 1482 (9th Cir.1986).

[12, 13] Ordinarily, judicial review of agency action is limited to a review of the administrative record. *Friends of the Earth v. Hintz, et al.*, 800 F.2d 822, 829 (9th Cir.1986). There are limited exceptions, however, when consideration of evidence outside the administrative record is necessary to explain agency action. *Id.*, at 830.

> When there is "such a failure to explain administrative action as to frustrate effective judicial review," the court may "obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary."

Id., quoting, Public Power Council v. Johnson, 674 F.2d 791, 793-94 (9th Cir.1982). The Court cannot, however, affirm any agency action by accepting post hoc rationalizations of counsel that are not grounded in the administrative record. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962), *citing, Securities and Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1576, 1577, 91 L.Ed. 1995 (1947). *Accord, Northern Cheyenne Tribe v. Hodel, supra*, slip op. at 36.

> The purpose of the court's enquiry [sic] should be to ascertain whether the agency considered all relevant factors or fully explicated its course of conduct or grounds of decision.

Friends of the Earth v. Hintz, supra, at 830.

2. Standard for Preliminary Injunctive Relief.

[14] To obtain a preliminary injunction within the Ninth Circuit, a party must show either:

(1) a likelihood of success on the merits and the possibility of irreparable injury; or

(2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor.

Apple Computer, Inc. v. Formula International, Inc., 725 F.2d 521, 523 (9th Cir.1984). These are not separate tests, but "the outer reaches 'of a single continuum.' " *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir.1980).

For the reasons discussed herein, the Court finds that the JBC has shown substantial likelihood of success on the merits and a possibility of irreparable injury.

THE FLATHEAD IRRIGATION PROJECT

By Act of Congress on April 23, 1904, the Flathead Indian Reservation was to be surveyed and allotments made to "all persons having tribal rights with said confederated tribes," and the surplus lands opended to settlement and entry by proclamation of the President.[3] Presidential proclamation formally opened the Reservation for settlement on May 22, 1909.[4] Shortly thereafter, the United States published a map of the Flathead Lake area advertising tracts of federal land, or "villas," for sale.

The Act of June 21, 1906 (34 Stat. 354) amended the Act of April 23, 1904, by adding the following section:

> Sec. 19. That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of the land is granted by this act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water.

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[3] 33 Stat. 302, 303 (Sec. 2), 304 (Sec. 9).

[4] 36 Stat. 2494.

In 1908, Contress provided for surveying and planning of irrigation systems to irrigate both the allotted lands of the Reservation and the unallotted irrigable lands to be disposed of under the Act of April 23, 1904.[5] Congress also amended Section 9 of the Act of April 23, 1904,[6] to provide for acquisition of water rights by settlers, and payment therefor before such rights would permanently attach.[7]

By Act of March 3, 1909 (35 Stat. 795), Congress appropriated $250,000 for construction of irrigation systems on the Flathead Reservation for both allotted and unallotted lands. Thereafter, Congress passed a number of appropriations bills to continue construction and maintenance of the Flathead irrigation system.[8] Each appropriation prior to 1916 was to be reimbursed from proceeds of the sale of lands and timber within the Reservation (35 Stat. 795). The Act of May 18, 1916 (39 Stat. 141), provided that all tribal funds used for the irrigation project should be returned and that payments for the irrigation work should be made by the land benefitted. By Act of May 25, 1948, Congress established a permanent subsidy of the irrigation system construction and operation and maintenance costs. (*Comprehensive Revenue* at 1-3.)

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[5] Act of April 30, 1908 (35 Stat. 83).

[6] See note 3, *supra.*

[7] Act of May 29, 1908 (35 Stat. 448).

[8] The following list was obtained from *Survey of Conditions of the Indians in the United States,* Hearings before a Subcommittee of the Committee on Indian Affairs, United States Senate, 71th Cong.2d Sess., pt. 6 (1930) (hereinafter referred to as the "Preston-Engle Report"), and is not intended to be exclusive.

Act of April 4, 1910 (36 State. 277):	$250,000
Act of March 3, 1911 (36 Stat. 1056):	$409,000
Act of August 24, 1912 (37 Stat. 526):	$209,000
Act of June 30, 1913 (38 Stat. 90):	$325,000
Act of August 1, 1914 (38 Stat. 593):	$200,000
Act of May 18, 1916 (39 Stat. 139):	$750,000
Act of March 2, 1917 (39 Stat. 980):	$750,000
Act of May 25, 1918 (40 Stat. 574):	$375,000
Act of June 30, 1919 (41 Stat. 16):	$375,000

(footnote continues)

The irrigable area of the project was first set at 152,000 acres, although that area was later reduced and now stands at 127,000 acres (*Comprehensive Review*, at 1-1). The Preston-Engle Report, consisting of an extensive study completed in 1928 of all Indian irrigation projects in the United States, provides a thorough background of the Flathead Irrigation Project and a detailed analysis of the reservoirs and storage features in each of the three divisions, as it existed at the time, as well as a summary of climate conditions on the Reservation and a study of water supply and irrigation development. At the time the study was conducted, Indians were irrigating 452 acres, or 1.3 per cent, of the 34,441 acres then irrigated. (71st Cong. 2d Sess., pt. 6 at 2217).

Today, the Project continues to serve both Indian and non-Indian water and power users. Approximately 90 percent of the water users are non-Indian. *Comprehensive Review* at 1-1. The power division of the Project serves close to 14,000 meters, and subsidizes the irrigation division; about 90 percent of FIP revenue is derived from power sales. *Id.*

ISSUES NOT BEFORE THE COURT

Immediately prior to the commencement of hearing the motion for preliminary injunction, the Court informed the parties that it considered this case to present an "agency abuse of discretion" question. The parties were instructed not to concentrate their efforts on specific water rights of any party or

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(footnote continued)

Act of February 14, 1920 (41 Stat. 408):	$200,000
Act of March 3, 1921 (41 Stat. 1225):	$200,000
Act of May 24, 1922 (42 Stat. 559-580):	$200,000
Act of January 24, 1923 (42 Stat. 1174):	$555,000
Act of June 5, 1924 (43 Stat. 390):	$150,000
Act of March 3, 1925 (43 Stat. 1146):	$ 35,000
Act of March 3, 1925 (44 State. 458):	$575,000
Act of January 12, 1927 (44 Stat. 934):	$ 25,000

The total cost of the Project to June 30, 1936, was $7,499,105.85. *U.S. v. McIntire*, 101 F.2d 650, 652 (9th Cir.1939).

other areas tangential to the central issue. Nonetheless, both during the hearing and in the briefs, many issues were raised and facts disputed which the Court believes unnecessary to a determination of the issues before it.[9] To illuminate the matters which are critical to the disposition of this litigation, I note that the following will not be decided herein.

1. This case will not adjudicate the priority or quantity of legal rights to the waters of the Flathead Indian Reservation. The Tribes have insistently argued that this action was triggered by the mere yielding of junior water rights to senior water rights. This is the same position advanced by the Tribes one year ago, and again, the Court emphatically declines to prioritize water rights.

It should be noted that the Stipulation of 1985 between the Government and the Tribes, which was entered into "[i]n recognition and acknowledgment of the Tribes' aboriginal rights," was neither approved by the Court nor incorporated into the record or the Court's order. *See* 616 F.Supp. at 1297. Thus, although I am sympathetic to the parties' frustrations over the lack of adjudication of their rights, no determination in that respect will be made in this federal forum in this case.

2. There will be no determination of how apportionment of the waters is to be made in the event of insufficient water to serve all needs. Eventually a situation may arise where the Flathead Reservation is faced with a true water crisis. At this point, however, no party has proved that there is not enough water to meet irrigation and fishery needs.

3. Although a considerable portion of the hearing was devoted to the specifics of different methodologies which may be used in measuring water for instream flow levels, the Court does not see fit to instruct the BIA that it must use a particular method at a particular place or for a particular reason. The Court sees advantages and disadvantages to both the Wetted

[9] This is not to say these matters are of no consequence. Many of the underlying issues are important to the Court's decision and, if nothing else, the hearing provided counsel a good preview for presentation of their respective cases to the state water court.

Perimeter Method and the Instream Flow Incremental Method, including time and cost factors, thoroughness of evaluation, and others.

4. There is clear and undisputed evidence that FIP is in a state of disrepair and in need of rehabilitation. The Secretary of the Interior commissioned a comprehensive examination of the Project for this very purpose. (*Comprehensive Review* at 1-1.) The Court, however, is not going to make findings on the causes of water problems within the Reservation or who is responsible for the same. I am not concerned with the obvious troubles caused by deteriorating reservoirs, excessive seepage, low snowpack or other extraneous problems, except to the extent, if any, that these factors pertain to the showing of irreparable injury to the JBC as a result of the BIA's actions.

5. There has been mention of Indian preference in hiring laws and the propriety, or lack thereof, in utilizing Tribal technical staff to assist in determining minimum instream flow levels. The Court has no concern about the competency of Tribal staff, and in fact the affidavits and materials on file indicate highly qualified Tribal personnel. But the issue in this regard is not whether the Tribes retain competent hydrologists and biologists. Rather, the question is whether the Portland Area Director of the BIA relied exclusively on Tribal input in rendering a decision and, if so, whether that was an abuse of discretion.

6. The Court will make no findings of fact directed to the quantity of water a crop of alfalfa requires at any given point during the summer, or whether it should be grazed after the final cutting, or the proper number of cuttings a prudent farmer should get each year in the Flathead. Different farmers operate differently, and whether or not conditions in the Jocko Division differ from conditions in the Mission Valley, such findings are immaterial to the ultimate disposition of the case.

7. Finally, this opinion is intended to establish no precedent for any party's use in the state of Montana's water adjudication process. The purpose of this decision is to provide interim guidance to the BIA, the Tribes, and the JBC until a final adjudication of water rights is made.

Moreover, at this stage of the case the Court is ruling on a motion for preliminary injunction. Since this is not an ultimate decision I have determined that it would be inappropriate to enter specific findings of fact at this time.[10]

MERITS OF PLAINTIFF'S MOTION

1. Possibility of Irreparable Injury.

At the time the temporary restraining order was issued in this case, the Court found a threat of immediate and irreparable injury that stored water for irrigation in the Jocko Division would be depleted by August 13, a critical period in the irrigation season.

The Tribes maintain that the JBC has suffered no irreparable injury of the type contemplated by Rule 65. The only injury, if any, the Tribes claim, is economic damages and thus the irrigators have an adequate remedy at law.

[15] It is true that economic loss, in and of itself, does not ordinarily constitute the irreparable harm required to support injunctive relief. *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669 (D.C. Cir. 1985). On the other hand, future injury of uncertain date and incalculable magnitude is irreparable harm, and protection from such injury is a legitimate end of injunctive relief. *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616, 630 (4th Cir.1979), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1021, 62 L.Ed.2d 756 (1980).

In this case, there was substantial evidence that serious crop damage would result from lack of water if implementation of the 1986 interim flows was not enjoined. There was also evidence that repercussions of that damage would be felt for years. Balancing the hardships which would befall the parties,

[10] If the parties so stipulate, pursuant to Rule 65(a)(2), Fed.R.Civ.P., the need for trial on the merits can be eliminated by agreement that the Court has all necessary evidence before it. In that event, this opinion and order would stand as the Court's final ruling. Otherwise, the evidence submitted thus far will become a part of the record on the trial and need not be repeated. Rule 65(a)(2), Fed.R.Civ.P.

the Court believed that the instream flow could be reduced to afford water for irrigation while still posing no threat to the fishery. The alternative might have been to allow crops to dry out, resulting in root damage; to force the irrigators to bring another suit for collection of damages, to wait for discovery, motions, and trial before a determination of compensation would be made; and in the meantime to have unproductive farms sitting in the Flathead Valley, where farmers already suffering from the previous drought year and threatened with foreclosure could hardly afford another year of loss. On that basis, the Court believes there was sufficient threat of irreparable injury.

[16] Now the United States, observing that irrigation needs are past and there is no longer a threat of irreparable injury, appears to suggest that the matter is moot.[11]

Generally, a case becomes moot " 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *Murphy v. Hunt*, 455 U.S. 476, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) [citations omitted]. Thus it is possible that, because the 1986 irrigation season is effectively at an end, and because the 1986 Interim Instream Flow and Reservoir Pool Level Agreement expires by its own terms on October 31, 1986, the issue is no longer "live" and the controversy is moot. In *Murphy v. Hunt*, however, the Supreme Court stated:

> We have recognized an exception to the general rule in cases that are "capable of repetition, yet evading review." In *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347 [348], 46 L.Ed.2d 350 (1975) (per curiam), we said that "in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in

[11] Even if the United States did not intend this suggestion, the Court is obligated to consider a potential mootness problem on its own initiative. *See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., supra*, 763 F.2d at 1034 n. 1.

> its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

Murphy, 455 U.S. at 482, 102 S.Ct. at 1183. Under this test, a mere physical or theoretical possibility is not sufficient. There must be a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party. *Id.*

Construing the "repetition/evasion" exception, the Ninth Circuit Court of Appeals has held it to be very narrow, to be applied only in "exceptional situations." *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir.1985), *quoting Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S.Ct. 1660, 1669, 75 L.Ed.2d 675 (1983). The exception "usually is applied to situations involving governmental action where it is feared that the challenged action will be repeated." *Lee*, 766 F.2d at 1390. The emphasis is on continuity of the parties. *Id. See also United States v. Max*, 779 F.2d 1415 (9th Cir.1986).

This case falls squarely within the repetition/evasion exception to the mootness doctrine. Demonstrated by the second annual appearance of identical parties, the dispute is capable of repetition. Although the issues in this case are not identical to the issues of last year's dispute, the underlying dilemma is the same. The root of the problem is the BIA's administration of the Project, but it comes to a head each year when the waters are becoming scarce. By the time the Court has an opportunity to examine the issues, there either is no water left to apportion or the irrigation season is over. In either situation, the immediacy of the problem has subsided, and it evades review. Therefore, the court will proceed under the finding that this matter is capable of repetition, yet evading review.[12]

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[12] This ruling is consistent with controlling Ninth Circuit authority. *See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1034 n. 1 (9th Cir.1985).

2. Likelihood of Success on the Merits.

[17] The JBC alleges that the BIA breached a fiduciary duty to the irrigators; breached an implied statutory obligation properly to operate, maintain, and administer the Project; violated its own regulations; and deprived the irrigators of their constitutional right to be protected from a taking of property without due process of law. The BIA claims that it considered the matter fully before making a determination, and that the methods used were reasonable under the circumstances, given time and cost restraints. The government further asserts that the JBC had a meaningful opportunity to participate in the process and chose not to do so. The Tribes echo the contentions of the United States and further argue that the government, as fiduciary, has an obligation to act in the Tribes' best interests, and need not include the Tribes' adversaries in all of the decision-making processes. The Tribes claim that the BIA was only fulfilling its obligation to allow priority of a senior water right over a junior water right.

For the Court to grant a preliminary injunction, there must be a showing that the JBC is likely to succeed on its argument that the BIA acted arbitrarily, capriciously, or in abuse of discretion in the method by which it established the 1986 interim instream flows and pool levels.

Since the Supreme Court's decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831), a unique relationship has been held to exist between the United States government and federally recognized Indian tribes. Generally, the special relationship imposes strict fiduciary standards of conduct on federal executive agencies in their dealings with Indian tribes. *See United States v. Creek Nation*, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331 (1935); *Northern Cheyenne Tribe v. Hodel, supra*, slip op. at 23.

The trust responsibility has been recognized with respect to enforcement and protection of tribal water rights. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C.1972). The Ninth Circuit also has emphasized the right to reserved water on Indian reservations for hunting and

fishing purposes. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.1981) [*Walton II*].

This Court, by issuing a temporary restraining order in *Confederated Salish & Kootenai Tribes v. Flathead Irrigation Project*, recognized the importance of preserving the naturally reproducing fish in the streams and reservoirs within the Reservation. *See* 616 F.Supp. at 1298. Although the Court never reached an ultimate ruling, it concluded that the Tribes "adequately demonstrated probable success on the merits as to [their] treaty rights." *Id.*

The Secretary of the Interior is charged with administration of the Flathead Irrigation Project. *See* 25 U.S.C. § 381, 25 C.F.R. § 171.1. Administration and appropriation of water rights between Indians and non-Indians have been a struggle for the government since the time of *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), when the doctrine of reserved water rights was created. Waters on the Flathead Indian Reservation have been in controversy since at least 1939, when the Ninth Circuit decided *United States v. McIntire*, 101 F.2d 650 (9th Cir.1939).

After tracing the development of settlement and irrigation on the Flathead Reservation, the court in *McIntire* held that successors in interest to lands of an Indian who had personally appropriated water for his own use acquired no valid right to the waters so appropriated. Because the United States held legal title to the land and waters of the Reservation for the benefit of the Indians, title to the waters could not be acquired by anyone except as specified by Congress. *McIntire*, 101 F.2d at 653. Therefore, the court held that the original Indian farmer through whom the claimants asserted their rights, obtained no valid water right. *Id.* The court was not confronted with the issue of whether the Secretary of the Interior acted erroneously because the case concerned application of state statutes and local custom. The court did, however, note the Secretary's statutory obligation to make "just and equal distribution" of the waters pursuant to 25 U.S.C. § 381. *Id.* at 654.

The Walker River Irrigation District in Nevada was also the subject of litigation in 1939. The Ninth Circuit held that the Indians of the Walker River Indian Reservation were entitled to an implied reservation of water to the extent reasonably necessary to supply their needs, and that the off-reservation settlers upstream were required to yield to the tribe's rights. *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 339 (9th Cir. 1939). Rejecting the arguments of estoppel against the government, the court stated:

> The settlers who took up lands in the valleys of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation below.

Id.

A related issue arose in *United States v. Powers*, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330 (1939), in which waters of the Crow Indian Reservation were in dispute. The water in question was needed for cultivation of lands allotted to members of the tribe and subsequently sold to non-Indians and held in fee simple. Similar to the History of the Flathead Reservation, the Crow Reservation had been surveyed and divided for allotment. The landowners bringing suit had succeeded to the interest of the original allottees. Their patents contained no express provision of water rights. At the time the action was commenced, irrigation works were under construction on the Crow Reservation. Without considering "the extent or precise nature" of the landowners' water rights, the Court held that "when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." *Powers*, 305 U.S. at 532, 59 S.Ct. at 346. Citing 25 U.S.C. § 381, the Court noted that the Secretary of the Interior, though authorized, had prescribed no rules or regulations to secure "just and equal distribution" of waters. Clearly, the court observed, Congress recognized" equal rights among resident Indians." *Id.* at 533, 59 S.Ct. at 347.

Powers ultimately became the foundation for the rule that an Indian allottee may sell his right to reserved water when he

secures a transfer of his allotted land. *See Colville Confederated Tribes v. Walton, supra,* 647 F.2d at 50. In *United States v. Ahtanum Irrigation District,* 236 F.2d 321, 342 (9th Cir. 1956), *cert. denied,* 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957), the Ninth Circuit Court of Appeals held that non-Indian purchasers of allotted lands are entitled to "participate rateably" [sic] with Indian allottees to the use of reserved water. The court found clear indication from *Powers* that the non-Indians did originally acquire a water right through purchase of allotments. *Id.*

In 1942, the Ninth Circuit refused to enjoin owners of certain Indian allotments from diverting water through privately constructed ditches. The court found no showing that the landowners "used an amount of water in excess of 'so much water as may be required to irrigate such lands.'" *United States v. Alexander,* 131 F.2d 359, 361 (9th Cir.1942). The court went on to state that assuming equal priority of water rights between allotted and unallotted lands (an issue which was not presented), "the general allotment act (25 U.S.C. § 381) requiring 'just and equal distribution' would be applicable here because of the insufficiency of the water supply." *Id.* The court noted that no regulations had been promulgated pursuant to that statute, and thus a violation thereof could not be shown. *Id.* The court refused to adjudicate the relative priorities of the water rights of allotted and unallotted lands, because of the absence of indispensable parties.

In a further expansion of non-Indians' rights to reservation waters, the court in *Scholder v. United States,* 428 F.2d 1123 (9th Cir.1970), held that the BIA was entitled to make expenditures on an Indian irrigation project which accrued to the exclusive benefit of a non-Indian landowner. The court stated that 25 U.S.C. § 13, which provides general authorization for the BIA to expend moneys, including costs for extension, improvement, operation and maintenance of Indian irrigation projects, does not require "that every individual irrigation expenditure be 'for the benefit, care and assistance of Indians.'" *Id.* The court's ruling was tempered by sharp criticism of the BIA's administration of the irrigation project,

noting that non-Indian construction requests had been fulfilled much more expediently than requests by tribal members. *Id.* at 1130.

A common thread running through the above cases is the age-old problem of competition for scarce water. Ordinarily, competing water interests must be resolved by water rights adjudication litigation. In a prior appropriations system, such as that used in most Western states, the outcome of water adjudication depends on the date of appropriation. In the Indian federal reserved rights context, of course, some differences arise. Clearly, however, where water rights have not been adjudicated, an alternative method must be developed for allocation of precious water resources.

Defendants admit that the irrigators own valid water rights, and indeed from a historical perspective, and in view of the case law cited above, it cannot be disputed that the non-Indian irrigators on the Flathead Reservation have rights to the waters, albeit unquantified. Equally clear is the existence of reserved water rights on behalf of the Tribes.[13]

Title 25, United States Code, section 381, provides in pertinent part as follows:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation. . . .

As part of the General Allotment Act, section 381 was enacted in 1887, in the spirit of assimilation and promotion of an agrarian society among Indians. Section 385, 28 U.S.C., provides for establishment of maintenance charges, reimbursement of construction costs, and apportionment of costs. The

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[13] If the Tribes choose to use water reserved for irrigation in a non-consumptive manner, they do not thereby relinquish any of their water rights to other appropriators. *United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir.1984).

Ninth Circuit has held that, although this chapter of Title 25 deals with "Indian allotments," it shows that Congress contemplated non-Indian use of Indian projects. *Scholder v. United States*, 428 F.2d at 1127. The court also noted that Indian irrigation projects have been sponsored and administered by the United States since the early 1900s, "and at all times the projects have served non-Indians as well as Indian lands within their boundaries." *Id.*

The Secretary of the Interior enacted no regulations under 25 U.S.C. § 381 until 1977. Operation and maintenance of Indian irrigation projects now are governed by part 171, Title 25, Code of Federal Regulations. Pertinent to this litigation is section 171.1(c), which provides as follows:

> (c) The Officer-in-Charge is responsible for performing such work and taking any action which in his judgment is necessary for the proper operation, maintenance and administration of the irrigation project or unit. In making such judgements, the Officer-in-Charge consults with water users and their representatives, and with tribal council representatives, and seeks advice on matters of program priorities and operational policies. The Officer-in-Charge will be guided by the basic requirement that the operation will be so administered as to provide the maximum possible benefits from the project's or unit's constructed facilities. The operations will insure safe, economical, beneficial, and equitable use of the water supply and optimum water conservation.

It is a well-known maxim that administrative agencies must comply with their own regulations. *Confederated Tribes and Bands of the Yakima Indian Nation v. F.E.R.C.*, 746 F.2d 466, 474 (9th Cir.1984). The regulations define "Officer-in-Charge" as the agency Superintendent, Project Engineer or such official as authorized by the Area Director. 25 C.F.R. § 171.1(a).

In this case, FIP personnel received a directive on July 17, 1986, from Stanley Speaks, Portland Area Director of the BIA,

that certain instream flows and pool levels were to be implemented. Speaks further directed that those flows and levels be monitored daily, and that a record be kept and provided to his office and to the Tribes on a weekly basis.

The origin of the BIA's involvement in setting interim instream flows is the 1985 stipulation between the government and the Tribes. By the terms of the stipulation, the BIA agreed

> to initiate discussions with the Tribes and other interested parties toward development of water conservation and management plans for FIP operations prior to September 17, 1985.

Stipulation, part VI, p. 9 (admitted as Plaintiff's Exhibit 1). In the Fall of 1985, the JBC received a letter from the Portland Area Office indicating the BIA's efforts to comply with the stipulation. The letter enclosed the first draft of the Bureau's Water Conservation and Management Plan, developed after discussions with the Tribes as to how the Bureau should proceed. A meeting was held on October 31, 1985, at which time the draft plan was discussed.

Over the course of the next several months, various correspondence was exchanged between the Project, the Bureau, and the JBC regarding establishment of interim instream flows. In its correspondence, the JBC consistently expressed a desire for involvement in the process. Most of the BIA correspondence consisted of proposals or advising the JBC of certain actions, and requesting comment. In a letter dated June 26, 1986, the JBC expressed concern that it was not being included in the decisionmaking process, but "merely asked to comment on a decision already made." (Plaintiff's Exhibit 8.)

The evidence shows that the studies which ultimately served as the basis for the Bureau's decision were conducted by Tribal and BIA technical personnel to the exclusion of the irrigators! The government submits that the JBC was given the opportunity to have its own staff participate, but did not retain anyone for this purpose until it was too late and the work already had been completed. The record does not support this contention.

In reviewing the record, the court is interested only in material relied upon by the Area Director in reaching his decision. *Burlington Truck Lines, supra,* 371 U.S. at 168-69, S.Ct. at 245-46. The post hoc efforts of counsel, both by argument and evidence submitted at hearing, to rationalize the BIA's decision, are meaningless unless these factors were actually considered by the Bureau in reaching its decision. The record is nearly devoid of any explanation or indication of the factors or computation which the Area Director took into account in arriving at the figures used in the 1986 interim plan. *See Pyramid Lake Paiute Tribe v. Morton,* 354 F.Supp. at 256. The only item of evidence the Court is able to determine was conclusive in the Area Director's determination is the series of inflection points picked by Tribal and BIA personnel at a meeting from which the JBC was excluded.

The "critical meeting" which became the focus of the JBC's complaint occurred on June 27, 1986. The purpose of the meeting was to analyze data collected from the wetted perimeter studies and select "inflection points" from which to determine possible instream flow levels.[14] Initially, the JBC was invited to attend and participate in this meeting. *See* Plaintiff's Exhibit 7. Subsequently, the JBC was advised that it would not be allowed to attend the meeting pursuant to objections registered by the Tribes. The inflection points selected at that meeting were identical to the points utilized by the BIA in fixing the 1986 minimum flows.

The Tribes insist that its was entirely proper for the JBC to be excluded from the meeting, first, because only the "technical people" who participate in collecting data are competent to participate in selection of inflection points, and second, because the Tribes are entitled to confer with their fiduciary in the absence of their adversary.

The Tribes' first argument consists of somewhat circular reasoning. Essentially, the argument is that JBC personnel

[14] Although the scientific methodology is receiving sketchy treatment in this opinion, I do not find it necessary to belabor the details, which are by and large immaterial to the decision herein.

were not qualified to participate in analyzing the data because they had not participated in the field studies, even though the JBC learned of the field studies only two weeks before they were to commence. *See* Plaintiff's Exhibit 5.

The contention that the fiduciary relationship obligated the BIA to meet privately with the Tribes is specious. It is true that the BIA owes special duties to the Tribes. As administrator of a water project beset with controversy, however, the BIA acts in a dual capacity. This dual capacity has been addressed by the courts many times in the context of the government's role as trustee for the Indians as well as representative of other federal interests. *See White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 925 (9th Cir. 1986). Speaking to this subject the United States Supreme Court observed:

> The United States undoubtedly owes a strong fiduciary duty to its Indian wards. . . . It may be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States. But where Congress has imposed upon the United States, in addition to its duty to represent Indian Tribes, a duty to obtain water rights for reclamation projects, . . . the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority for the United States to represent different interests.

Nevada v. United States, 463 U.S. 110, 142, 103 S.Ct. 2906, 2924, 77 L.Ed.2d 509 (1983).

The same reasoning is applicable here, for although the government is not serving as advocate for opposite sides of a controversy, it is serving as advocate and judge. Thus, the exclusion of the JBC from one meeting may not be critical if it is a meeting between fiduciary and ward. Where, however, that meeting is between one party to a controversy and the judge of that controversy, the exclusion of the other party is a different matter. Here, because the only element in the record lending

support to the BIA's decision is the series of figures selected at that one meeting, the conclusion is inescapable that the BIA relied exclusively on Tribal and BIA input in reaching its decision.

Having reached that determination, I must consider whether it was improper for the BIA to look only at Tribal demands in establishing instream flows and pool levels for the Project. Returning to the regulations promulgated by the Secretary of the Interior, the court notes several affirmative obligations placed upon project administrators. Section 171.1(d) states in pertinent part:

> close cooperation between the Indian tribal councils, the project water users and the Officer-in-Charge is necessary and will be to the advantage of the entire project.

The regulations impose a duty upon project management to consult with water users and their representatives, and with tribal council representatives, and to seek advice on matters of program priorities and operational policies. 25 C.F.R. § 171.1(c). From the evidence adduced at hearing, and from the affidavits on file herein, the Court finds no indication that the Area Director or his agents consulted with the water users, and not even a suggestion that the interests and concerns of the water users were considered in the final outcome! [15] From this glaring absence of a record upon which the director's decision was based, I find that the JBC has sustained its burden of showing a likelihood that the BIA's decision was arbitrary and constituted an abuse of discretion. In the presence of a sufficient showing of irreparable injury, this warrants issuance of a preliminary injunction.

The problems facing the Flathead Reservation are not unique, but neither are they insurmountable. It is tragic that

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[15] It is interesting to note that the government's emphasis on its fiduciary duty to the Indians in this case is contrary to its position in *Northern Cheyenne Tribe v. Hodel*, CV 82-116-BLG, when in support of his decision to issue coal leases the Secretary of the Interior argued that his duties and responsibilities extend to all United States citizens, and he was compelled to act in the "national interest." Slip op. at 29.

the system has operated for so many years under the conditions that appear to exist. A comparison of the 1928 study conducted by Porter J. Preston and Charles A. Engle with the 1985 study conducted by BIA and Bureau of Reclamation staff reveals a severe lack of attention to the Project over a sixty-year period.

The Preston-Engle Report recommended, for all Indian irrigation projects, that rules and regulations for project operation and maintenance be formulated and distributed; that cordial relations be promoted; that the formation of water users associations be encouraged and that the project management attend the meetings of such associations for discussion of problems and complaints; that a thorough investigation of water supply be conducted, following which all projects would be reduced to the acreage for which there is a safe and dependable water supply; and that water rights be established and protected. (71st Cong.2d Sess. pt. 6 at 2211-13.)

The authors of the Report recommended strongly that the *Winters* doctrine be invoked and enforced with respect to all those reservations where necessary to secure an adequate water supply for Indian lands. The *Winters* doctrine, it was stated, "is a measure of simple fairness and justice to the Indian, and is essential to his welfare." *Id.* at 2231. The authors did not recommend, however, that the government enforce *Winters* rights to the detriment of the non-Indian settlers:

> We believe, however, that in making practical application of this principle the Government and not the pioneers should stand whatever losses may result from the Government's failure to properly protect the Indians in their water rights. In our judgment the Government owes a duty to the pioneers as well as to the Indian.

Id. The Report recommended that where the application of *Winters* would result in loss of water rights regularly acquired by appropriation and beneficial use, the government should secure *Winters* rights either by purchase of valid rights or by the construction of storage reservoirs for the impounding of flood or surplus waters. "Any other course, in our opinion, would be

penalizing the rights of private citizens for the failure of the Government to properly protect the Indian in his water rights." *Id.* at 2213.

The Preston-Engle Report also suggested that the Flathead Irrigation Project be transferred to the Bureau of Reclamation, which had a larger and better trained staff for administering water projects. *Id.* at 2257-60. This suggestion was mentioned nearly 60 years later in the *Comprehensive Review* study. The authors reached a different conclusion, however, recommending that management of the irrigation division be transferred to the water users themselves, and that administration of the power division be transferred to the Tribes.

The *Comprehensive Review* reflects many of the problems expressed by the parties to this litigation. The authors found a "serious lack of communication and coordination" between the Project, the Tribes, the JBC and the Flathead Agency. *Id.* at 1-9. They observed that such interaction is essential for efficient operation and resolution of controversial issues. The *Review* also noted racial and political tension on the Reservation and differences of opinion with respect to transfer of Project management.

Included in the study was an extensive engineering report, which concluded that FIP irrigation facilities are in a deteriorated condition, such that, without rehabilitation, portions of the system will soon stop functioning. *Comprehensive Review* at 1-8, 1-31. The Engineering Committee "guessed" that dam rehabilitation costs would be in the neighborhood of 55 million to 80 million dollars. *Id.* at 1-36.

From a historical as well as current perspective, it is evident that FIP is facing serious challenges. The Bureau of Indian Affairs must be cognizant of these challenges and do everything in its power to ameliorate the difficulties. The 1985 *Comprehensive Review* was available at the time the bureau was making its determinations with respect to 1986 interim flows. Yet the BIA appears not to have proceeded cautiously and conscientiously in making those determinations.

CONCLUSION

The effect of the Court's order in 1985 was to advise the Secretary that he would not be permitted to suck dry the streams of the Flathead Reservation in derogation of tribal treaty rights. Here I conclude that neither shall the BIA be allowed to seriously injure 2,600 irrigators by totally disregarding their rights. The actions of the Secretary are legally wrong—if not inexcusable.

The Court is not so much concerned with the Bureau's ultimate specific decisions pertaining to administration of the Flathead Irrigation Project, as I am interested in the manner in which such decisions are reached. "Just and equal distribution" is a guiding principle for Project management. This principle applies to all waters of the Reservation. It does not require distribution of an equal quantity of water to every claimant, but it does require that the manner of distribution be fair.

There is a high duty and a heavy burden on the BIA under present circumstances to exercise sound judgment and to fairly administer this water project. The BIA should use this opinion and the 1985 decision as parameters, and should reach a fair middle ground in allocating these water resources until such time as the State of Montana adjudicates the respective priorities of the competing rights of the parties.

> Difficult as this process [may] be, and troublesome as the repercussions of his actions might be, the Secretary [is] required to resolve the conflicting claims in a precise manner that [will] indicate the weight given each interest before him.

Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. at 256-57. The parties would help themselves by striving to reach a negotiated agreement with the state Water Rights Compact Commission and by encouraging the expeditious resolution of the water rights adjudication process. Until then, the Bureau is responsible for fair and equitable administration of the irrigation system, and is encouraged to apply common sense and careful deliberation in its decisions.

ORDER

Based upon the foregoing opinion,

IT IS HEREBY ORDERED that the Plaintiff's motion for preliminary injunction is GRANTED. During the pendency of this case, and until further order of this Court, the Bureau of Indian Affairs, United States Department of the Interior is enjoined from implementing the 1986 Interim Instream Flow and Pool Level Agreement or any other such plan which fails to consider the rights of any interested party.

JOINT BOARD OF CONTROL OF the FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS.
Plaintiff-Appellee.

v.

UNITED STATES of America.
Defendant.

and

Confederated Salish and Koōtenai Tribes of the Flathead Reservation
Defendant-intervenor-Appellant.

No. 86—4317.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 5, 1987.

Decided Nov. 17, 1987.

Before CANBY, REINHARDT and BEEZER, Circuit Judges.

CANBY, Circuit Judge:

The Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts (the Joint Board) brought suit to enjoin the Bureau of Indian Affairs (the BIA) from continuing to implement its 1986 operating strategy for the Flathead Irrigation Project in Montana. The District Court granted the preliminary injunction and the Confederated Salish and Kootenai Tribes of the Flathead Reservation (the Tribes) appealed. We review the District Court's grant of injunctive relief pursuant to 28 U.S.C. § 1292(a)(1). We reverse.

FACTS AND PROCEDURAL HISTORY

This case involves a continuing dispute surrounding the operating strategy by which the BIA provides water supplies controlled by the Flathead Irrigation Project to serve the competing demands of tribal fisheries and irrigated agriculture. The first litigation was commenced by the Tribe. In 1985, the Tribes determined that drought conditions—a combined effect of diminished precipitation and high summer temperatures—would diminish flows and decrease water levels in the Reservation's rivers and reservoirs. They brought an action to enjoin the BIA from distributing waters to the irrigation districts in such a manner as to deplete the streams and reservoirs and cause what the Tribes viewed as irreparable damage to the Tribal fisheries. The Joint Board intervened. According to the Tribes, the BIA's efforts to meet the demands of irrigated agriculture at the expense of tribal fisheries violated the Tribe's fishing rights secured by the Treaty of Hell Gate, 12 Stat. 975 (1859), and the Tribe's implied reserved water rights. *See Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). The district court issued a temporary restraining order. The parties then entered a stipulation that established minimum stream flows and reservoir water levels for the 1985 irrigation season and set forth procedures for establishing future minimum flows and water levels. The District Court consequently dismissed the action as moot. *Confederated Salish and Kootenai Tribes of Flathead Reservation v. Flathead Irrigation and Power Project*, 616 F.Supp. 1292 (D.Mont.1985).

By the summer of 1986, the BIA had established an interim operating strategy that provided greater protection for tribal fisheries by ensuring minimum stream flows and minimum reservoir levels. In some instances, implementation of these flow requirements diminished the availability of irrigation water. On August 4, 1986, the Joint Board brought this suit for injunctive relief against the United States, claiming that the BIA

had abused its discretion in establishing the 1986 Interim Instream Flow and Pool Level Agreement.[1] The Tribes intervened. According to the Joint Board, the BIA had abused its discretion by failing to give consideration to the rights and interests of the irrigators in determining a water distribution strategy, and by inequitably distributing the water supplies of the Flathead Irrigation Project.

The District Court issued a temporary restraining order and then held a hearing on whether to issue a preliminary injunction. Subsequent to the hearing, the district court found that the Joint Board had "shown substantial likelihood of success on the merits and a possibility of irreparable injury" and granted the preliminary injunction. *The Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 646 F. Supp. 410 416 (D.Mont.1986).

In addition to enjoinging the BIA from continuing to implement the 1986 Interim Instream Flow and Pool Level Agreement, the District Court set forth legal principles for allocating the scarce water supplies of the Project. The District Court viewed the different positions taken by the BIA in 1985 and 1986 as extreme, polar positions—first protecting the irrigators at the expense of the Tribes and, second, protecting the Tribes at the expense of the irrigators. The District Court counseled that the BIA must be guided by the principle of "just and equal distribution" of "*all* waters of the Reservation." *Joint Board of Control*, 646 F.Supp. at 426.

DISCUSSION

I. *Article III Justiciability*

[1] Before we can reach the merits of the appeal, we must determine whether this case is moot. A live case or controversy within the meaning of Article III of the Constitution may exist even after the challenged activity, in this case the 1986 Interim

[1] The Interim Instream Flow and Pool Level Agreement was not an agreement at all. The "agreement" never received the approval of either the Tribe or the Joint Board of Control. Nevertheless, it was the strategy by which the BIA operated the Flathead Irrigation Project during the 1986 irrigation season.

Agreement, has ceased, if the action is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911); *see, e.g., Lee v. Schmidt-Wenzel*, 766 F.2d 1387 (9th Cir. 1985). This exception to the mootness doctrine is applicable to cases where: "(1) the challenged action is of limited duration, too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Wiggins v. Rushen*, 760 F.2d 1009, 1011 (9th Cir.1985). This controversy clearly meets the first requirement. Operating strategy for each irrigation season has such a short life that it cannot effectively be subjected to appellate review. The second requirement is also satisfied; the challenged activity is likely to recur. The same parties were before the district court as a result of the BIA's operating strategy in 1985 and 1986. Subsequent to the filing of the action challenging the 1986 Interim Agreement, the parties were again before the district court challenging the 1987 operating strategy. This controversy has recurred and will continue to recur.

Moreover there is a continuing public interest in determining the appropriate legal principles by which the BIA should distribute water, which transcends the particular distribution strategy selected in any given year. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 D.Ct. 894, 897, 97 L.Ed. 1303 (1953). We conclude that this case is not moot.

II. *Standard of Review*

[2, 3] We ordinarily review a district court's decision to issue a preliminary injunction for an abuse of discretion. *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir.1985). A district court abuses its discretion if it employs erroneous legal standards in issuing or denying the injunction, or bases its decision upon erroneous legal premises, *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200 (9th Cir.1980). Whether a legal standard or premise is erroneous is a question of law that we review de novo. *See Douglas v. Beneficial Finance Co.*, 469 F.2d 453, 454 (1972).

III. *The Merits of the Injunction*

[4] In order to determine the proper allocation of water in short supply, the relative priorities of the water rights of the claimants are obviously of great relevance. In determining to issue the preliminary injunction, however, the district court made it very clear that it had "no intention of adjudicating water rights." 646 F.Supp. at 415, 417. The sources of the district court's reluctance are not hard to find. There is a clear federal policy to permit general water rights adjudications to be performed in state courts. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Federal actions brought for the purpose of determining the priority of water rights will generally be dismissed in favor of concurrent state court proceedings. *See e.g., Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). At the time of the district court's decision, the State of Montana was in the process of determining water rights within the state,[2] an undertaking expected to consume many years.

In the meantime, however, controversies like the present one arise and must be decided. *See Kittitas Reclamation District v. Sunnyside Valley Irrigation District,* 763 F.2d 1032 (9th Cir.1985), *cert. denied,* 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985). The district court recognized that fact in ruling that it would not defer decision in favor of a state water rights adjudication that might not reach the Flathead Reservation until 1990. *Joint Board,* 646 F.Supp. at 414-415. Yet the district court undertook to decide the controversy, for purposes of preliminary injunction, while blinding itself to the possible priorities of water rights among the litigants. That position is not tenable.

The district court held that the principle that must guide the BIA in allocating *all* of the waters of the reservation was a "just and equal distribution." 646 F.Supp. at 426. Inherent in

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[2] *See* Act to Adjudicate Claims of Existing Water Rights in Montana, Ch. 697, 1979 Laws of Montana 1901, described in *San Carlos Apache Tribe,* 463 U.S. at 554, 103 S.Ct. at 3207.

that conclusion, however, is an assumption concerning the priorities of the water rights of the competing claimants. The requirement of "just and equal distribution" is derived from a section of the Dawes Act, 25 U.S.C. § 381, which authorizes the Secretary of Interior to make regulations for the allocation of *irrigation* water within Indian reservations. It presumes that all of those who seek irrigation water stand on the same footing, in which case "just and equal distribution" is appropriate. *See United States v. Alexander,* 131 F.2d 359, 361 (9th Cir.1942). A similar assumption underlies the Secretary's regulation calling for "close cooperation" between the Indian and other project users. 25 C.F.R. § 171.1(d).[3] Thus, if all of the parties had derived their rights from the same reserved source, and all shared the same priority date, then it would be appropriate to decree an equitable sharing of the shortfall during times of drought. *Colville Confederated Tribes v. Walton,* 752 F.2d 397, 405 (9th Cir.1985), *cert. denied,* 475 U.S. 1010, 106 S.Ct. 1183, 89 L.Ed.2d 300 (1986). That, however, is not the situation presented by this case.

The action of the BIA that was attacked and enjoined in the district court was the establishment of minimum stream flow and pool levels to preserve the tribal *fisheries.* The Treaty of Hell Gate provided:

> The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians . . . .

12 Stat. at 976. In *United States v. Adair,* 723 F.2d 1394 (9th Cir.1983), *cert. denied,* 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984), we held that similar language, accompanied by a history indicating that one of the essential purposes in creating the reservation was to preserve the Indians' right to fish, created a reserved water right in the Tribe. *Id.* at 1408-11. Moreover, when the Tribe exercised aboriginal title and rights

[3] The Tribes contend that 25 C.F.R. § 171 was not enacted pursuant to 25 U.S.C. § 381. In light of our disposition, we need not address that question.

to fish on the lands and waters in question before the reservation was created, the priority date of the reserved water right for fishery purposes is time immemorial. *Id.* at 1412-15.

[5] The Tribes in this case contended that they had exercised aboriginal fishing rights over the territory and waters in issue. The district court did not permit the Tribes to make a record on that point. Yet their claim is clearly a colorable one; we have stated elsewhere that one of the Tribes was heavily dependent on fishing the area when the Treaty of Hell Gate was signed. *Confederated Salish & Kootenai Tribes v. Namen,* 665 F.2d 951, 962 (9th Cir.1982), *cert. denied,* 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982). To the extent that the Tribes here did exercise aboriginal fishing rights, the treaty language clearly preserved those rights, and the water needed for them. *Adair,* 723 F.2d at 1412-15. The priority date of time immemorial obviously predates all competing rights asserted by the Joint Board for the irrigators in this case. Once a court takes jurisdiction to resolve a water rights dispute, it has "a solemn obligation to follow federal law" that governs Indian water rights. *San Carlos Apache Tribe,* 463 U.S. at 571, 103 S.Ct. at 3216. It was error, therefore, for the district court to hold that water claimed under potentially prior tribal fishing rights must be shared with junior appropriators, and that the requirement of equitable sharing could be imposed without addressing the Tribes' claim of aboriginal fishing water rights.

At oral argument, the Joint Board contended that the law would not permit the tribal fisheries to be protected in full if the result was to deprive a much larger number of farmers of the water needed for irrigation. This contention ignores one of the fundamental principles of the appropriative system of water rights. *See e.g., Morris v. Bean,* 146 F. 423 (C.C.D. Mont. 1906) (Montana water law requires that senior rights be fully protected, even though more economic uses could be made by junior appropriators). "Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users." *Walton,* 752 F.2d at 405 (citing *Cappaert v. United States,* 426 U.S. 128, 138-39, 96 S.Ct. 2062,

2069-70, 48 L.Ed.2d 523 (1976)). To the extent that the Tribes enjoy treaty-protected aboriginal fishing rights, they can "prevent other appropriators from depleting the streams (sic) waters below a protected level." *Adair*, 723 F.2d at 1411; *see Montana v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985).

[6] Part of the district court's rationale in enjoining the BIA from carrying out its operating strategy was that the BIA acted arbitrarily in establishing minimum stream flows and water levels for the Indian fishery without the participation of the Joint Board. Here again, however, the asserted right of the Joint Board to participate was based upon the requirements of "just and equal distribution" of the Dawes Act, 25 U.S.C. § 381, and the regulation requiring "close cooperation" between Indian and other water project users, 25 C.F.R. § 171.1(d). As we have already pointed out, those provisions impose duties upon the BIA in managing the Project's *irrigation* water in fairness to all irrigators; they do not deal at all with the BIA's duty in helping the Tribes to protect their prior and paramount fishing water rights. While the Joint Board and junior appropriators are free to contest by legal means the Tribes' and the BIA's quantification of the Tribe's fishing water rights, the Joint Board has produced, and we find, no authority that guarantees it a right to participate in the process by which the BIA and the Tribes initially establish that quantification.

CONCLUSION

The reluctance of the district court to render a final adjudication of water rights in the Flathead Irrigation District is quite understandable. We do not suggest that the court is required to make any such general adjudication or quantification in the course of these proceedings. But the preliminary injunction under review, and the principle established for future irrigation years by the district court's opinion, fail to accord potentially superior tribal fishing rights the protection that federal law gives them against claims and considerations of junior appropriators.

The action of the BIA in establishing stream flow and pool levels necessary to protect tribal fisheries is not unreviewable. In making its determination, however, the BIA is acting as trustee for the Tribes. Because any aboriginal fishing rights secured by treaty are prior to all irrigation rights, neither the BIA nor the Tribes are subject to a duty of fair and equal distribution of reserved fishery waters. Only after fishery waters are protected does the BIA, acting as Officer-in-Charge of the irrigation project, have a duty to distribute fairly and equitably the remaining waters among irrigators of equal priority.

The order of the district court granting the motion for preliminary injunction is reversed, and the preliminary injunction is vacated. The case is remanded for such further proceedings as may be appropriate and consistent with this opinion.

REVERSED, PRELIMINARY INJUNCTION VACATED, CASE REMANDED.